AMERICAN BAR ASSOCIATION JOVRNAL

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Resolved, That the American Bar Association hereby determines and declares that any lawyer who publicly or secretly aids, supports or assists the World Communist Movement to accomplish its objectives in the United States, by participating in its program, whether he be an avowed party member or not, is unworthy of his office and should not be permitted to become or remain a member of the American Bar Association.

From Resolutions Adopted by Assembly and House of Delegates in Seattle, September 8-9; Implemented by Further Action of the House (*page 899*)

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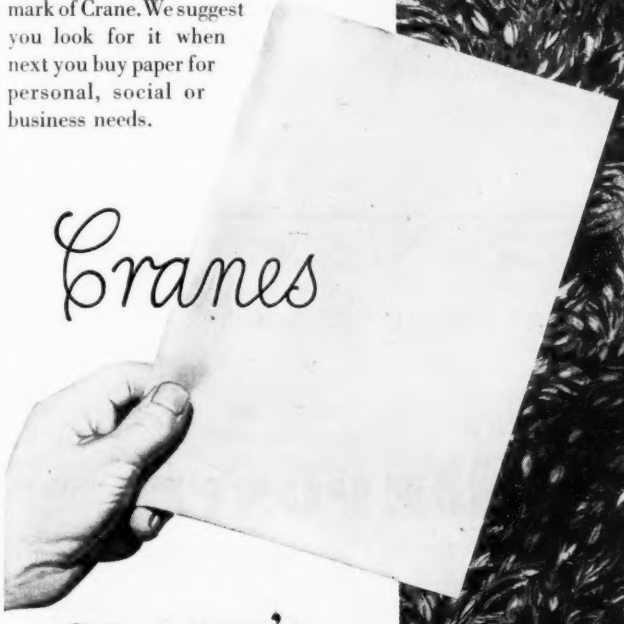

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(Continued from page III)

present form is not in draftsmanship or contents suitable for approval by the General Assembly or for acceptance and promulgation by the member nations, including Canada and the United States. The text of the action of the two Associations, preliminary to their renewal of active cooperation on this matter of common concern to their two countries is reported in this issue, as is also the action voted by the House of Delegates of our Association on two other subjects which also merit the consideration of lawyers and citizens generally.

President Holman To Write Monthly Message for Our Readers **20**

Our Association's new President will continue and utilize "The President's Page", to enable him to convey each month, to all our members, such information and message as he deems to be appropriate concerning the work and objectives of our Association and the organized Bar.

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71st Annual Meeting:

"Highlights" of Memorable Seattle Sessions

■ With the attendance surpassing expectations and the hospitality, interest and earnest purpose such as to make the occasion unforgettable in the minds and hearts of those present, the 1948 Annual Meeting of our Association, held in Seattle, in the State of Washington, under the leadership of President Tappan Gregory, of Illinois, combined the utmost in enjoyment with the accomplishment of a really notable program of work. The spirit which pervaded the deliberations and the patriotism and good sense which dominated the decisions demonstrated anew that the organized Bar of America, mobilized under the aegis of the American Bar Association, is still on the upswing of militant and useful work for the future of America. The hospitality of our Seattle hosts and the diligence of their efforts to make all visitors feel truly at home have never been excelled in the annals of our Annual Meetings; but serious purposes were at all times manifest in all of the sessions, held with full awareness of the grave issues which beset our country in its domestic policies and its international relationships. Undoubtedly the convocation had an inspiriting and unifying effect on our Association's work and workers for the year which began with the adjournment in Seattle; and Incoming President Frank E. Holman and all of those who are associated with him in the leadership and direction of our Association's activities found that the Assembly and the House of Delegates had voted actions which determine and constitute a full-scale program of useful work in aid of an informed opinion among lawyers and the public on momentous and fundamental issues. Members who could not come to Seattle but who read in this and following issues of the *Journal* the reports of debates and votes, the principal addresses delivered, and the plans made for the year's activities, will be enabled to take their place and have their part in the tasks at hand. The work of the new Association year seemed to start with unusual vigor and promptness; President Holman made clear and explicit many of the vital things he will emphasize and endeavor to advance; and at once put forth an earnest plea, in Seattle as well as through the *Journal* (34 A.B.A.J. 757; September, 1948), that he needs and wishes the active help of every member of the Association, in behalf of our country and our profession, in the year which will culminate in our 72nd Annual Meeting, to be held in St. Louis, Missouri, during the week of September 5.

■ The registration at the Seattle meeting was 2104. This was considerably more than had been expected or indicated for a convocation held so far from the largest centers of Association membership. Hotel and transportation facilities were taxed to the utmost, but everyone seemed to have a good time nevertheless, without serious inconvenience. The 1948 meeting was unique in that, for the first time in at least the modern history of our Association, every dinner, every breakfast, and every luncheon, under the auspices of the Association or any of its Sections or Committees, was sold and attended to capacity or a little more.

From the opening session of the Assembly, which President Gregory called to order in the great Civic Auditorium on Monday morning, September 6, the attendance and interest at all meetings were most gratifying. Many of our members had come by the special trains, had visited scenic points and formed warm friendships en route; many of those attending brought members of their families; and the whole week, from beginning to end, was pervaded with the hearty and generous hospitality and charm of beautiful Seattle and the State of Washington.

Retiring President Richard S. Munter, of Spokane and the Washington State Bar, welcomed the throng in a felicitous address which left no doubt as to the sincerity and good fellowship of the greeting. Harrison Tweed, of New York, made an appropriate response. From that time on, the hospitality of the city and State were everywhere manifest. Many enjoyable events had been planned, including motor trips up majestic Mt. Rainier, boat trips around the harbor and lakes, garden parties and teas in gracious homes

amid lovely settings, and an all-day trip by ship to colorful Victoria, capital of British Columbia in Canada, where about 1000 visitors were received and entertained by the Province Government.

For Monday evening, our Seattle hosts undertook and fulfilled most graciously an unprecedented task. All registered visiting members of our Association, with those of their families present, were transported to and entertained at suppers in the homes of Seattle lawyers, before the address of James F. Byrnes, former Secretary of State. The only exceptions to this large-scale hospitality in homes were a number of registrants who arrived in Seattle too late and too unexpectedly to permit them to be assigned and provided for. A downtown club was taken over for these, and their gastronomic needs were thus met.

For all that was done by way of hospitality and entertainment, the lawyers of the city and State had been efficiently organized and were admirably directed. Tracy E. Griffin, of Seattle, was the capable chairman of the general committee (34 A.B. A.J. 488; June, 1948); he was elected president of the Washington State Bar before our meetings opened. He had a host of energetic and thoughtful assistants; Miss Clydene Morris, executive secretary of the State Bar, was untiring in her vigilance that everything and everyone was looked after.

The Annual Dinner a Memorable Occasion

The 1948 meeting ended where it had begun, in the spacious Civic Auditorium. The Annual Dinner was a brilliant and enjoyable affair. President Gregory presided, as he had at all sessions of the Assembly.

After the many distinguished guests on the dais had been introduced, the presentation of the 1948 Gold Medal of the Association to Chief Justice Arthur T. Vanderbuilt was made in an impressive fashion, as is reported elsewhere in this issue. The speaker of the evening was the eloquent and admired Leonard W. Brockington, K. C., of Ottawa, Canada, who came first to our Association at its 1936 convocation in Boston and has thrilled and inspired our dinner audiences on five occasions since. Introduced by Stephen E. Hurley, State Delegate from Illinois, Mr. Brockington delivered a delightful and memorable address, which we hope to be able to obtain and publish in full from the transcript in our November issue.

The concluding event of the dinner and the 1948 meeting was President Gregory's presentation of Frank E. Holman, as the incoming President, who had been elected on the opening day. Mr. Holman spoke briefly and forcefully, along the lines of his "pre-induction" statement as published in our September issue (page 757). He was enthusiastically greeted by the great audience, which included many of his long-time coworkers in the Bars of Seattle and Washington State. With the induction of his successor, President Gregory declared the dinner and the 1948 Annual Meeting duly adjourned and ended.

Working Sessions of the Assembly and the House of Delegates

Beyond all the hospitality extended and enjoyed this was a working meeting in the Assembly and the House. Under our Association's democratic procedure provided in the Constitution, the Assembly fulfilled its part in policy-making, notably through the resolution which is quoted from on the cover of this issue and is elsewhere set forth in full.

A total of eleven resolutions were offered on the floor of the Assembly by individual members and were considered and reported on by the Committee on Resolutions, under the chairmanship of Roy Bronson, of California. Nine were presented and referred without debate at the first session of the Assembly on September 6, and two were offered later. Four of the resolutions were not approved by the Committee or the Assembly, and four were referred to Committees or Sections for their consideration. One of the resolutions so deferred by reference was that as to federal aid for adequate housing. This action is reported and commented on under "Editor to Readers" in this issue.

The three approved by the Committee on Resolutions and subsequently adopted by the Assembly and concurred in by the House as declarations of Association policy were: (1) a resolution presented by former Congressman Hatton W. Sumners, of Texas, which called for a halt in the extension of federal bureaucracy and in the "squandering" of federal funds for "unconstitutional purposes"; (2) a resolution drafted and offered by Edwin M. Otterbourg, of New York, as elsewhere reported, which called for the expulsion from membership in our Association of anyone who "publicly or secretly" aided the world Communist movement in the United States; and (3) a resolution offered by Robert V. Bolger, of Pennsylvania, which called for an educational program to teach the "principles of our constitutional Bill of Rights", was referred to the Committee on the Bill of Rights for implementation.

Elected by the Assembly as its delegates to the House of Delegates, through the usual processes of balloting, were: Robert G. Storey, of Texas; Alfred J. Schweppe, of Washington; Frederic M. Miller, of Iowa; Charles E. Lane, of Wyoming; and John Kirkland Clark, of New York.

The proceedings of the Assembly will be summarized from the transcript in our November issue.

House Debates and Votes Important Steps as to Communists

The sessions of the House had a heavy calendar but it transacted its business with dispatch, under Chairman Howard L. Barkdull, who was finishing his able service as presiding officer of the House. Members of the House in attendance totalled 170. Every State in the Union was represented by one or more delegates, together with the District of Columbia, Hawaii and Alaska.

The House had and took the time to debate important matters and give full consideration to voting on such

of them as were ready for present action to decide our Association's stand and policy. The debates were unusually earnest and on a thoughtful plane; the stature and sure-footedness of the House as the representative senate of the profession was never more manifest than in Seattle. Several of the most important debates and actions voted by the House are separately reported elsewhere in this issue; others are briefly summarized at this point and will be more fully reported in our November number; others are left for report in that issue.

Responsive to the rising tide of opinion in our profession and the public, the House gave the fullest consideration to what should be recommended and done as to Communism and Communists to safeguard the American form of government and way of life. Soundly, the House was much concerned that our Association and profession shall first put their own houses in order against Communist infiltrations and influences. The earnest debates showed much solicitude that governmental and Association action against Communists shall not flout or disregard American principles and practice of fair play and even-handed justice for even the most odious of guilty persons; but there was an ascendant belief also that inasmuch as those who "publicly or secretly" espouse or aid the Communist invasion of our country, our representative organizations, and our government in all branches, are ruthless in their contempt for American ways of justice, the legal profession should come to grips with reality as to needed methods of defense and counter-attack and cannot advise dealing with Communists as though they were an American ideology and an authentic political party devoted to American traditions.

As is chronicled more fully elsewhere in this issue, the actions voted in Seattle may be summarized as follows:

(1) Support for the Mundt-Nixon bill against subversive activities, as it was drafted and passed by the House of Representatives in the 80th Congress. (See editorial, "The Point Where Toleration Ends", 34 A.B.A.J. 696; August, 1948.)

(2) Declaration (by the Assembly and the House) that lawyers who "publicly or secretly" aid the Communist movement, whether a member of the Communist Party or not, are unworthy of our profession, and should not "become or remain" members of our Association.

(3) Declaration that "proved members of the Communist Party" who are members of our Association should be expelled.

(4) Declaration that a lawyer's refusal to answer, before a duly constituted inquiry, as to whether he is or was a Communist, should be "compelling cause" for his expulsion.

The Board of Governors and State and local Bar Associations are expected to take the just and necessary steps to accomplish the results sought by these resolutions.

Important Actions Voted in Field of International Law

An unexpected division of opinion

Tea Party in Victoria

Bill Holkett

WHEN PRESIDENT FRANK E. HOLMAN and Last Retiring President Tappan Gregory headed a party of about 1000 members of our Association and their wives and children, who went by boat as guests of the Seattle and Washington State Bar Associations on September 10 to Victoria, the capital of the Province of British Columbia, the visitors from the United States were received and entertained by the Government of the Province and were tendered a luncheon in the historic House of Commons, which had been cleared for the occasion. They were graciously received by Acting Premier Anscombe and Mrs. Anscombe, Chief Justice Wendell P. Farris, and Attorney General Gordon Wismer and Mrs. Wismer, on the floor of the House. Afterward they were hospitably shown much of what Rudyard Kipling described as "the color, the gaiety, and the graciousness of the town and the island"; like Kipling they responded with what he termed "unbelievable adjectives". Finance Minister Anscombe was Acting Premier, in the absence of Premier Johnson, who was in Europe. In the Houses of Parliament, the above interesting photograph was taken. Left to right, it shows Acting Premier Anscombe (seated), Chief Justice Farris (standing), President Holman (seated), Attorney General Wismer (standing), and Retiring President Gregory (seated). Believe it or not, the members of the group are drinking tea.

having developed between the Association's Committee on Peace and Law Through United Nations and the Section of International and Comparative Law, and opposing resolutions having been offered (as reported elsewhere in this issue), the House voted by a close division to hold over until its mid-year meeting action on the Pact of Bogotá, which emanated from the Ninth International Conference of American States (34 A.B.A.J. 800; September, 1948). The Committee's resolution for approval of the Pact was deferred and referred until the Section could report on it to the mid-year meeting. The House voted its disapproval, and urged withdrawal by the Senate, of the various reservations attached to the Pact by the United States representatives (See 34 A.B.A.J. 801; September, 1948).

On recommendation of the Committee on Peace and Law Through United Nations, the House urged strong support for the United States delegation and the Interim Committee ("Little Assembly") in their efforts to secure an agreement that will reduce the number of crippling vetoes in the voting in the United Nations Security Council. The House voted disapproval of the present form of the revised Draft Decla-

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Tappan Gregory Becomes Editor-in-Chief of the Journal

■ In Seattle on September 6, 1948, the Board of Editors of the JOURNAL reluctantly accepted the resignation of William L. Ransom, of New York, as Editor-in-Chief. Tappan Gregory, of Chicago, who was completing his year as President of the Association, was chosen as his successor.

TAPPAN GREGORY

With the completion of the present issue, Mr. Ransom will retire from connection with the JOURNAL, and as its Editor-in-Chief, member of the Board of Editors, and its representative in the Board of Governors. He has been a member of the Board of Editors since 1937 and its Editor-in-Chief since July, 1946. His resignation was due to reasons of health and the demands of his law practice.

Mr. Gregory was Chairman of the House of Delegates in 1944-46 and has been President of the Association during the year which ended with the Seattle meeting. He has been an *ex-officio* member of the Board of Editors in each of those capacities. Our November and subsequent issues will be in his charge.

As has become increasingly evident due to the present size and scope of contents, the JOURNAL entails an extent of editorial work which requires much time and cannot longer be performed on an uncompensated basis. The Board of Editors has placed the position of Editor-in-Chief on a salaried basis; and the new Editor-in-Chief as required by present needs, will be able to give to the work all of the time required.

The matter of Mr. Ransom's retirement will be adequately treated in the November issue. E. J. D.

3

New Federal Judicial Code: Enactment by 80th Congress a Notable Gain

by **Albert B. Maris** • Circuit Judge, United States Court of Appeals for Third Circuit

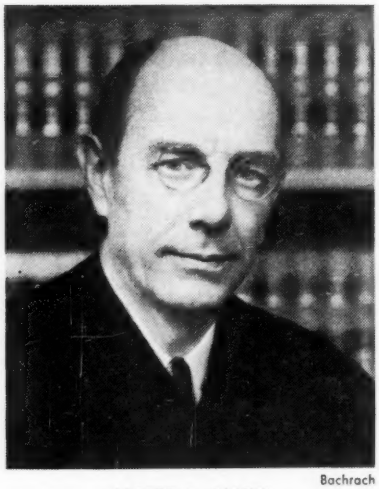
■ Lawyers generally are not yet aware of the extensive changes in nomenclature of the federal Courts and in important angles of the statutory law which were accomplished when the 80th Congress passed and the President signed the new federal Judicial Code, designed to bring together as Title 28 of the United States Code the statute law applicable to the federal judiciary and to make that enactment the law of its subject matter rather than merely evidence of that law. To prepare for us our first authoritative article on the new Judicial Code, the *Journal* was fortunate to obtain Circuit Judge Albert B. Maris, of the Third Circuit, who was appointed by Chief Justice Stone as Chairman of the Judicial Conference's Committee on Revision of the Judicial Code and in that capacity has had the closest contact with the project from the beginning and has worked in continual collaboration with the Committee on the Judiciary in the United States House of Representatives and Senate under the chairmanships of Earl C. Michener, of Michigan, and Alexander Wiley, of Wisconsin, respectively, with the two great law publishing houses whose expert staffs did much of the detail work, and with the various advisers and consultants who were brought in to assist on this monumental task. The "non-controversial" changes approved by the legislative committees which had the accomplishment of the revision so much at heart are numerous, and many of them are important things for lawyers to learn without delay. All, or nearly all, of them will be recognized readily as forward steps in strengthening and improving the administration of justice in the Courts of the United States. Judge Maris writes most interestingly and specifically of details of this major legislative accomplishment, and tells of the way in which, and by whom, the work was done. An editorial in this issue discusses one of the significant aspects of the new Code.

■ Upon the signing by the President on June 25 of Public Law 773 (H. R. 3214), a measure of far-reaching importance to the bench and Bar of the United States became law. For that measure, which went into effect on September 1, completely codifies and revises all the statutory law relating to the federal judiciary and its procedure. Only twice before in our history has such a task been attempted—once in 1874, when the Revised Statutes of the United States were enacted, and again in 1911, when the Judicial Code of that year was passed. The Judicial Code of 1911, however, fell far short of including all the laws relating to the judiciary. Indeed, when the Judicial Code was included in Title 28 of the United States Code in 1926, it was necessary to add five chapters to the title in order to include laws relating to the judiciary which had been omitted from the Judicial Code.

The Act just passed is in the form of a codification and revision of Title 28 of the United States Code. As such it covers the entire subject-matter of that title. Moreover, it enacts the title, as thus codified and revised, into positive law. Thus Title 28 of the United States Code now itself becomes the basic law and not merely *prima facie* evidence of it as heretofore. This has been done in pursuance of a Congressional plan to proceed title by title to enact the United States Code into law, repealing all prior legislation upon the subjects covered. Acts passed by the 80th Congress have accomplished this in the case of Titles 1, 3, 4, 6, 9, 17 and 18, in addition to Title 28. This means that the lawyer or judge who is considering a subject that is included in one of these titles will find in the United States Code all of the basic statutory law and will not be compelled to go back to the many volumes of the statutes-at-large in which the original legislation, now repealed, was set out.

Codification of Title 28 Includes Many "Non-controversial" Improvements

This is itself an achievement quite worth while. But in the case of Title 28 very much more has been accomplished. During the thirty-seven years since 1911, a tremendous amount of additional legislation in this field has



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ALBERT B. MARIS

been enacted. The result has been the existence on the statute books of a large mass of legislation of which much is archaic, ambiguous, conflicting and to an unascertained extent repealed by later statutes. Moreover, in the interim the Federal Rules of Civil Procedure and those of Criminal Procedure have been promulgated by the Supreme Court and have rendered a great many procedural statutes wholly or partially obsolete. The revision of Title 28 has made it possible to remove these inconsistencies and ambiguities. Obsolete and archaic provisions have been removed or modernized. The consolidation of actions at law and suits in equity into one form of civil action, which was accomplished by the Federal Rules of Civil Procedure, has been carried into the statutes. A glance at the new Act will demonstrate that the revisers have been particularly successful in arranging, in a logical and consistent way, the statutory material which remains in force. The law has been made easily accessible, not only to the lawyer, but to the layman as well.

The Committee on Revision of the Laws of the House of Representatives, which initiated the work, authorized the revisers to make a revision as well as codification of the law, incorporating such non-controversial changes as might be deemed appropriate. The result is that the revision includes a great many non-controversial but much needed improvements which, while in many instances small in themselves, add up in total to a very substantial improvement in and modernization of the law relating to the federal Courts and providing for their operation and procedure. It will be of interest to review briefly some of these. Unless otherwise specified references will be of the new sections of Title 28.

Improved Administration of the Business of Each District Court

Perhaps the most significant improvement of all is the statutory recognition that the federal Court system has grown in size and volume of business to the point where adequate provision must be made for the administration of the business of each individual Court. For the first one hundred years of our history, each federal district Court in the United States was held by a single District Judge. Except in a very few districts the business was light, and the problems involved in conducting the District Court by the one judge who held it were few and simple. But with the opening of the twentieth century, the business of the federal Courts began rapidly to increase. It became necessary to appoint additional District Judges in many districts, particularly in the metropolitan areas, until today the District Courts in the District of Columbia and the Southern District of New York have twelve judges each and only thirty-five of the eighty-seven United States District Courts still carry on with a single district judge. In nearly every case the statutes which authorized additional judges merely provided that they were to have the same powers as the judge or judges already in commission. Prior to 1911 no general statutory provision for the division of a District Court's business among the judges had been made, and no one of them was given by law any responsibility for seeing to the proper administration of the Court's business. And in the Judicial Code of 1911 it was provided merely that the District Judges might agree upon the division of business and that if they did not, the Senior Circuit Judge should as a sort of arbitrator divide it among them.

A Chief Judge for Each Multiple-Judge District Court

The revision for the first time gives full recognition to the problems of administration which are involved in the efficient distribution and dispatch of business by a multiple-judge District Court and makes specific provisions for meeting them. In the first place an administrative

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Concerning the Author: Albert Branson Maris, of Philadelphia, member of our Association since 1924, United States Circuit Judge in the Third Circuit, was born in Philadelphia in 1893, and was graduated from the Temple University Law School in 1918. He had served meanwhile in the Coast Artillery of the United States Army and had been discharged with the rank of Second Lieutenant. Admitted to the Pennsylvania Bar in that year, he practiced law for about a year in Chester and thereafter in Philadelphia. From 1933 to 1936 he was the Editor of *The Legal Intelligencer* in that city. In 1936 he was appointed a United States District Judge and was elevated to the United States Circuit Court of Appeals for the Third Circuit by President Roosevelt in 1938. He was designated by Chief Justice Stone as a Judge of the United States Emergency Court of Appeals in March of 1942 and as its Chief Judge in June of 1943. By appointment of Chief Justice Stone he was chairman of a committee authorized by the Judicial Conference to collaborate with Congressional committees in the revision of the Judicial Code. As such he was very active in that work. He has been an adjunct professor of law at Temple University, in Philadelphia, since August of 1941. He is a member of the Religious Society of Friends, and of the Philadelphia, Delaware County, and Pennsylvania Bar Associations as well as of the American Bar Association.

office, that of Chief Judge, is created, to be filled by the District Judge senior in commission. The law recognizes that the senior judge may not be able to undertake these administrative duties in addition to his judicial work. Accordingly, if he desires to be relieved of them while still continuing as an active District Judge, he may so certify; and the Chief Justice of the United States will designate as Chief Judge the District Judge next in seniority who is willing to act (§136).

Provision is then made that the business of the Court is to be divided among the judges as provided by the rules and orders of the Court, and the Chief Judge as administrative head of the Court is made responsible for the observance of these rules and orders and for the division of business and assignment of cases, so far as the rules and orders of the Court do not otherwise prescribe. (§137). The multiple-judge District Court is thus given full power to provide for its efficient operation with an administrative head to supervise that operation; and it is only if a majority of the District Judges are unable to agree on rules and orders for the division of business, that an outside authority, the Judicial Council of the Circuit, is to be called in to act.

Moreover, the revision confers upon the District Courts full power to fix the times for holding regular terms of Court, the previous statutory provisions fixing the times for holding such terms being repealed. (§138). District Courts may adjourn or, with the consent of the Judicial Council of the Circuit, pretermit any term of Court for insufficient business or other good cause. (§140). The District Court, rather than the senior District Judge, appoints the Clerk and Court Reporters (§§ 751, 753); and the Clerk and his deputies are required to perform such duties as the Court assigns. (§ 956). The Court fixes the place or places where the Clerk's office shall be maintained and the Court records kept. (§§ 457, 751). Thus the District Courts are given authority over their operations and personnel commensurate with the responsibility which is placed upon them.

U. S. Courts of Appeals Presided Over by a Chief Judge

An equally significant advance is made by the new Act in the case of the Circuit Courts of Appeals, now to be known as "United States Courts of Appeals". (§43 (a)). Originally created in 1891, these Courts were to consist of three judges each. The increase in business soon required the appointment of more than three Circuit Judges in many circuits, so that today there are seven Circuit Judges in two of the circuits and six in five of the others. The statute nonetheless still provided that the Court should consist of three judges. In circuits having more than three Circuit Judges obvious questions arose. Which three of the Circuit Judges should sit at a given session? Could all the Circuit Judges sit *in banc*? The latter question was answered affirmatively by the Supreme Court in 1941 in *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue*, 314 U.S. 326. In the opinion in that case, the conflict and ambiguity in the statutes providing for the functioning of the Circuit Courts of Appeals was fully discussed.

The revision eliminates these difficulties. The Court of Appeals for each circuit consists of the Circuit Judges in active service. (§43 (b)). The Court may authorize the hearing of cases by divisions of three judges each. (§ 46 (b)). Cases are to be heard by a Court or division of three judges unless hearing or rehearing before the Court *in banc* is ordered by a majority of the active Circuit Judges. (§46 (c)). Thus the advantage of having what many regard as the ideal number—three judges—to sit in all ordinary cases is retained, while giving the full Court complete power of ultimate control over its decisions by ordering a hearing or rehearing *in banc* whenever necessary. Moreover, the Court determines the order in which, and the times when, the individual Circuit Judges are to sit on the Court and its divisions (§46 (a)), thus answering the first question to which reference has been made.

For a number of years Congress has been moving toward a closer integration of the federal judiciary. Legislation was passed authorizing District Judges to be assigned to other districts in their own circuits, and in other circuits as well, when the public interest required it. Likewise, Circuit Judges might be assigned to hold District Courts in their circuits and, by recent legislation, they were authorized to be assigned to sit in other Circuit Courts of Appeals and District Courts as well. These statutes called for an increasing amount of administrative attention on the part of the Senior Circuit Judges whose duty it was under the statutes to approve and make such assignments.

The revision recognizes that an administrative head is needed in each circuit, and accordingly creates the office of Chief Judge of the Circuit, to be held by the Circuit Judge senior in commission. It recognizes also that the senior judge may be physically or temperamentally unsuited to carry this administrative responsibility in addition to his regular judicial work. Accordingly, as in the case of the chief judgeship of a District Court, if the senior judge desires to be relieved of these administrative responsibilities while continuing as an active Circuit Judge, he may so certify, and the Chief Justice will designate as Chief Judge of the Circuit the Circuit Judge next in seniority and willing to act. (§ 45).

The Judicial Conference Will Report Directly to the Congress

In furtherance of this program of integration, the Conference of Senior Circuit Judges was created in 1922, at the instance of Chief Justice Taft. The Conference now becomes the "Judicial Conference of the United States", consisting of the Chief Justice of the United States and the Chief Judges of the eleven Circuits.

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Accomplishments of United Nations: Specific Gains for Peace and Law Give Hope

by Orie L. Phillips • Chief Judge, United States Court of Appeals for Tenth Circuit

■ We live today in a troubled world. The balance between peace and war is so delicate that no one can forecast the future with certainty. Yet, if we strive to the utmost to bring about and maintain peace in the world, I believe there is basis for reasonable hope of attaining those objectives.

International wrongs can be redressed and international rights enforced *through force* by a nation powerful enough to compel by force. International wrongs can be redressed and international rights vindicated *through peaceful processes* if the nations of the world will in good faith commit themselves to the principle of international justice and ordered liberty under law, made effective by conciliation, arbitration, and adjudication.

The first of these alternatives means war with all its tragedy, destruction, and misery; it means the sacrifice on the altar of war of the flower of our young manhood and womanhood; it means the useless exhaustion and destruction of material resources; it means the economic, social, physical, mental and moral repercussions that follow in the wake of war; it means a struggle of might with the most destructive agencies that the ingenuity of man can devise, the cumulative effect of which we do not yet fully understand; it means death and destruction and misery in both combatant and noncombatant areas; it may mean the end of the American way of life, the loss of our free institutions and our precious liberties.

The other alternative means international justice and ordered liberty under law for all the nations of the world. It assures respect for the rights of the weak as well as the strong nation; it means the preservation of individual liberty and free institutions, the recognition of the dignity of man and his right to hope, to aspire, to achieve, and to pursue happiness; it means that liberty-loving and law-abiding peoples may continue to enjoy free institutions and individual liberties; it means a fair opportunity for the individual

■ Many of us came away from Seattle, where we had the opportunity of talking with lawyers, judges, and their wives from practically every part of the country, with a strong feeling that one of the most regrettable and truly disturbing phenomena of American pubilc opinion today is that there is becoming deep-rooted a despairing belief that the United Nations is so beset with controversies, vetoes, frustrations, set-backs, and defeats, that it is accomplishing little or nothing for peace, justice, and law in the world; that there is little to be said as to accomplishments and gains through the United Nations; and that the earnest hopes of men and women for an international order based on law and adjudication as means of pacific settlement of disputes, are vain and illusory. This pessimism is of course due primarily to what is published in newspapers and magazines and to what is circulated in conversations—"good news" is rarely news; contests and controversies have "news value" in every phase of human activity, and the constructive side is rarely depicted to our people. The fault may be considerably the kind of bureaucratic, starry-eyed propaganda that has emanated from many sources identified with the United Nations, including at times the spokesmen for our own government. Their efforts to divert the United Nations and to force untested social and economic reforms on peoples not ready for them is an unconvincing substitute for keeping the peace.

Despite all the anxieties about the "cold war" with Russia and all the publicizing of vetoes and "road-blocks", the United Nations has repeatedly achieved substantial gains for the pacific settlement of disputes that might have led to armed conflicts in a world which Communist infiltrations and plottings have already made too much of a "tinder-box". The tragic thing is that our people, even the lawyers, generally do not know of these peace-saving gains. I know of no higher duty resting upon all members of our Association than that of studying and familiarizing themselves with these accomplishments as well as the nature and causes of the obstacles, and then *making the opportunities and occasions* for telling these things hopefully to the rank and file of our

to attain his highest hopes and aspirations; it means a moral, intellectual, social, and cultural renaissance throughout the world; it means the fulfillment of the words of the Prophet: "He . . . shall rebuke many people and they shall beat their swords into plowshares and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more."

Peace and Ordered Liberty Under Law Can Be Achieved

Can we venture to hope that the latter alternative can be attained? My answer is: We can and we must. It will be my purpose to support that thesis. I have an abiding conviction that those objectives can and should be accomplished within the framework of the United Nations. I am not unmindful that many persons have lost faith in the United Nations and that it has been characterized as impotent. But, as I shall presently undertake to show, that loss of faith and characterization are not justified by the record.

I recognize the danger that the cold war between the United States and the Union of Soviet Socialist Republics—which for brevity I shall hereafter refer to as Russia—may develop into a shooting war. Neither am I unmindful that Marxian Communism is atheistic and materialistic; that it rejects the concepts of moral law and eternal justice; that it adheres to the doctrine that man has no God-given rights; that man is the subject, not the master, of the state; and that expediency, rather than principle, has dictated Russia's foreign policy in the past. We should not forget Russia's alliance with Hitler; her share in the rape of Poland; her unprovoked attack on little Finland; the agreement between Stalin and Hitler to divide Eastern Europe and shut Britain and the United States out of Europe, Asia, and Africa; and the fact the alliance broke up only because the two villains disagreed on the division of the spoils.

I have no patience with those who say we should try to understand Russia in the sense we use that phrase. We should firmly adhere to a policy that is right and just, but we should exercise patience and reasonable forbearance. It is my opinion that Russia will go to any end to attain her objectives, short of war. I do not think she will intentionally provoke or bring about war because she is not yet prepared for war, and no reason exists which would make her regard war as expedient.

ORIE L. PHILLIPS

UN a Mighty Influence for Peaceful Solutions with Russia

Of course, the United Nations cannot compel a peaceful solution of the conflicts between Russia and the Western Powers. But it can exercise, and is exercising, a mighty influence in that direction.

The organs of the United Nations, except for the recent negotiations in Moscow, are the only places where regular contact and discussion have been maintained between the Western Powers and Russia. The United Nations has acted as a restraining and a conciliating influence upon the parties to the conflict. Around

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despairing or doubting people. State and local Bar Associations can and should be the forums for putting these facts before the people without delay and for arousing and organizing their members to do this in small meetings, where the opportunity can be created, in every community. The future of international organization, peace, and law may depend on the way in which, and the celerity and thoroughness with which, lawyers do this job.

A distinguished member of our profession who has given vast amounts of his time, leisure, and strength to this task, despite the great and exacting burdens of his judicial duties, is our own Judge Orie L. Phillips. Before State and local Bar Associations, large and small, before audiences in churches and civic organizations and women's clubs, and most recently in Seattle before our Section of Mineral Law, this member of our Association's Committee for Peace and Law Through United Nations has not spared himself in order to bring together the evidence and tell the encouraging story. Everywhere it is thus presented lawyers and people say, in substance: "We are so glad to hear these things. We had heard so much of the 'bad news' that we had become discouraged about the usefulness of the United Nations. We wish that everyone could hear this story, because it would end the conversational campaign against the United Nations."

The *Journal* has persuaded Judge Phillips to let us publish one of his convincing talks on the subject. It contains in concise form the specific instances which every lawyer should read and study for himself, obtain such more detailed material as he wants, and prepare himself to tell his fellow-citizens of the repeated accomplishments of the United Nations against obstacles. Judge Phillips is a hard-headed realist; his marshalling of the evidence is impressive. The existing international organization should and will be strengthened, but it is the "world's best hope for peace", as he sees it, the forerunner of further gains for constitutionalism and a juridical order in a world which may perish without it. Lawyers should take the lead in acquainting all our people with the facts which show that there is no sufficient reason for the ascendancy of mere indifference, discouragement or despair about the ability of the nations, or nearly all of them, to work together for peace, justice, and law.

W. L. R.

the tables of council chamber and committee room, the pressure is always in the direction of agreement and the peaceful processes of settlement. It provides an atmosphere favorable to peace, not to objects of conspiracy. Its growing influence is unceasingly in the direction of peace and away from war. The meetings of the General Assembly are a sort of world town meeting. The airing of grievances and the debate of proposals bring issues and contentions into the open. The world knows about them. No iron curtain keeps secret proceedings of the Assembly.

General Assembly Judgment Speaks for Conscience of the World

Before it a nation's policies are tested by the requirements of the Charter and are submitted to the public judgment of world opinion. The moral suasion which will be engendered by a righteous judgment expressed by a great majority of the members of the Assembly may be more compelling than military force. It is a public judgment manifesting the conscience of the world. I doubt that any nation, however powerful, will dare long to continue a course of conduct condemned by the considered judgment of a great majority of the members of the General Assembly.

Reasons To Hope for a Peaceful Outcome With Russia

There are other reasons for hope. All is not well behind the iron curtain. Tito has dared open defiance. He has refused to collectivize the peasant farms. There is much evidence of disillusionment and unrest among the peoples of the satellite states. Acute shortages of consumers' goods exist. Russia cannot help. She cannot yet supply her own needs, and takes, rather than gives. Rationing, instead of being relaxed, is becoming more stringent. The peasants have no desire to produce more food for money that lacks purchasing power in terms of real goods. Hence, Russia's insistent demand for collectivization of agriculture. That it will succeed with the liberty-loving, individualistic and courageous peasants may be doubted. Guns can subdue but they cannot grow food. If Tito is not brought to book, Soviet power in the satellite states which rest on a weak economic foundation may well face defiance elsewhere. History teaches that dictatorships are comparatively short-lived.

The rehabilitation of Western Europe goes forward under ERP. The Russian menace is a stimulus to economic and to some degree political union in western Europe.

UN Has Quenched Many Local Fires That Might Have Spread

In the past, world wars at their inception were not between great powers; they developed from incidents. The United Nations from time to time has quenched many local fires which might have well spread into world conflagrations. In July of 1947, large forces of the Netherlands attacked the forces of the Indonesian Republic which was challenging Dutch authority and asserting its right to independence. Shortly thereafter, the Security Council established a Committee of Good Offices.

After months of patient effort to secure full observance of a cease fire order, that Committee brought about a truce last January which has since avoided a renewal of the civil war between the Netherlands and Indonesia that threatened to involve 70,000,000 people. At the same time, the Committee secured an agreement on political principles as a basis for final settlement. Such principles include the establishment of a sovereign United States of Indonesia linked with other parts of the United Kingdom of Netherlands. Through the Committee, on the basis of the agreed principles, negotiations have since continued for a permanent settlement.

In the latter part of 1947, there was grave danger that the entire subcontinent of India with its 400,000,000 people would be plunged into a bloody religious and communal war. The Kashmir dispute was aired through debate in the Security Council. Hope of settlement through peaceful channels increased. The United Nations sent a commission to India. The issues between India and Pakistan are being discussed in a calmer atmosphere, and plans are being worked out for a plebiscite in the disputed area.

When Greece charged that Yugoslavia, Bulgaria, and Albania were actively aiding the guerrillas, defying the Greek government, the Security Council sent a commission which interviewed many witnesses. It found the evidence supported the charge and made recommendations. An adverse vote by Russia prevented acceptance of the recommendations. The matter then passed to the General Assembly which requested such border nations to keep out of Grecian affairs and appointed a commission to go to Greece and watch for border violations. As a result, outside aid to the guerrillas has been greatly diminished and their ultimate defeat in the near future seems certain.

UN Intervention Helpful in Korea and Palestine

In Korea, a portion of which is occupied by American, and the other by Russian troops, the diplomats of both countries were in violent disagreement. With Russia protesting every inch of the way, the General Assembly established a commission to go to Korea and supervise a free and democratic election. Russia prevented the commission from entering the northern zone, but the commission successfully supervised a free election in the southern zone.

The 30-year-old Palestine problem was brought to the United Nations by the United Kingdom, which announced the intention of giving up its mandate. The General Assembly adopted a resolution for the partition of Palestine into Jewish and Arab states with an economic union and the internationalization of Jerusalem. A commission was appointed to supervise the implementation of the plan. The Arab states rejected the plan and declared they would oppose it by force. The United States opposed the use of force to compel partition. War between the Jews and the Arabs ensued. After four weeks, a mediator appointed by the United Nations brought about a truce of indefinite duration. The mediator,

aided by United Nation guards and teams of military observers equipped with jeeps, airplanes, and coastal vessels, is supervising the truce and is proceeding with the difficult work of reconciling the conflicting interests and claims of Arabs and Jews and effecting a permanent settlement.

In April of 1946, Iran protested that Russian troops were interfering in its domestic affairs. Notwithstanding a walk-out by Gromyko, the Russian representative who claimed the matter should not be on the Security Council agenda, the discussion took place, focusing public attention on the situation. The troops were then withdrawn.

Protests by Lebanon of the presence of British troops and by Syria of the presence of French troops, followed by discussion in the Security Council, resulted in the withdrawal of such troops.

The tense dispute between the United Kingdom and Albania, growing out of mine explosions in the Corfu Channel, came before the United Nations. It recommended that they refer the case to the International Court of Justice. Reference was made. The Court, by a unanimous opinion, sustained its jurisdiction. The parties concluded a special agreement which forms the basis for further proceedings before the Court.

UN Gains Added Strength and Solidarity with New Members

Herbert Vere Evatt, Australia's Minister of External Affairs, said in an article published early this year in *Life* magazine:

> Personally I shudder to think what might have happened in 1947 if there had not been a UN, and I believe that if the organization can be kept alive two or three more years, it may become virtually impossible for another "shooting war" to break out within our lifetime.

When the United Nations Charter was signed, China was the only fully independent member state in eastern Asia. In three years India and the Philippines, original members, and Burma and Pakistan, since admitted, have become independent states. Siam has been admitted. Ceylon's application was vetoed by Russia. The Mongolian Peoples Republic has applied for admission. Cambodia, Ceylon, Hong Kong, Laos and Malayan Union sit as associate members. In western Asia, Afghanistan and Yemen are members, and Transjordan has applied for membership.

Thus, in three years these rising nations of Asia, with a combined population greater than the total population of Europe and the western hemisphere, have manifest confidence in the United Nations and are making their influence felt in its work.

Judicial Organization and Mutual Self-Protection in the Americas

The Inter-American Treaty of Reciprocal Assistance now in effect between nineteen American republics, constituting more than one-third of the member states of the United Nations, entered into in accordance with Articles 51, 52, 53, and 54 of the Charter, is a splendid example and a concrete demonstration of what can be accomplished within the framework of the Charter by nations willing to submit themselves to a rule of law, to bind themselves to submit every controversy which may arise between them to settlement through peaceful processes, and to afford mutual assistance and defense against defined aggression.

The treaty "affirms as manifest truth that juridical organization is a necessary prerequisite of security and peace and is founded on justice and moral order. . . ." It provides that the high contracting parties "undertake to submit every controversy which may arise between them to methods of peaceful settlement". It defines aggression. It provides that "the organ of consultation shall take its decisions by a" two-thirds vote, and that "in the case of a situation or dispute between American states the parties directly interested shall be excluded from the voting".

Thus, what shall constitute an act of aggression is not left to *ex post facto* debate on political levels, as under the Charter, and action by the organ of consultation, to stop aggression or remove threats of aggression, is not subject to a minority veto, as is action by the Security Council under the Charter.

Pacific Settlement and Unity of Americas Under the Charter

Under the Treaty, no signatory may veto or block action under the defined procedure for pacific settlement of controversies within the Americas, or prevent united action, in the exercise of the inherent right of united self-defense, against an aggression from any source, anywhere within the continental American zone defined in the Treaty. The sole limitation is that no nation "shall be required to use armed force without its consent".

This Treaty outlaws war and aggression; it affords practical means for the settlement of disputes by juridical or other peaceful processes; and it provides for the common defense against attack. By it, the principles and purposes of the Charter of the United Nations are practically assured among the nations in the western hemisphere.

Why Hasn't UN Been More Effective?

Perhaps the greatest impediment to constructive accomplishment by the Security Council has been the obstructionist attitude of Russia, made effective by its unbridled use of the veto power, a power originally regarded as a necessary safeguard but intended to be resorted to only in an extreme emergency. There were indications at Yalta that Russia wished to restrict the positive functions of the United Nations in maintaining peace. This was made more evident at San Francisco on June 1, 1945, when the representatives of Russia demanded that the veto be applied at the very start of the Security Council procedure for settling disputes. Following instructions from Moscow, Andrei Gromyko demanded that the Security Council should be deprived of the right even to discuss and consider a complaint from an aggrieved or threatened state without the unanimous agreement of all of the five permanent members. This radical departure from what had been

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Team-Work in Tax Practice: Lawyers and Accountants Should Work Together

by George E. Ray and Oliver W. Hammonds • of the Texas Bar (Dallas)

■ The "feudin' and fussin'" between accountants and lawyers over who can and will help John Q. Taxpayer the "bestest and mostest" is apparently snowballing[1] in direct proportion to the volume of tax business, and the tax business shows considerable signs of absorbing the attention of the entire country—at least for the current election year.

There have been and will be for some time to come endless writings, discussions and arguments about where to draw the "line" in the tax work of these two great professions.[2] It is submitted, however, that what is required by them is not a drawing of the line, but an erasing of the line, so as to permit the maximum amount of team-work by both professions, a thing which is required in the majority of tax cases, if they are to be properly handled, whether in (1) the advisory area, (2) the pre-litigation area, or (3) the litigation area.

Certainly the government, against whom the solution of all tax problems is ultimately directed, has found it wise, sound and necessary to have a combination of lawyer and accountant[3] working together on the solution of tax problems in these three areas. Why should the taxpayer be handicapped by a lesser combination in his behalf?

Proceeding on this basic premise, that cooperation and teamwork are required and desirable between the two professions, in their own interest as well as that of the public, the question then is how to best bring about that desirable result. It is believed that one of the most effective ways in which this can be accomplished is by a more complete exchange of ideas and understanding between the lawyer and the accountant as to what the other does in the solution of a tax problem.[4] With this purpose in mind, and in the hope that it will furnish the impetus for a continuing and constructive program, involving a more complete exchange of thoughts and ideas between the professions, we here undertake to discuss some of the contributions that a properly trained and competent lawyer specializing in tax matters—the tax attorney—

■ Of intense practical interest and consequence to the average practitioner anywhere in the United States is the respective role of the lawyer and the accountant in tax matters at all stages. Regrettably, the proper areas of the service rendered to clients by the two professions have become involved in conflict, controversy, even litigation, because of belief by many lawyers that accountants invade their field in tax practice and undertake to give advice and assistance on which the client-public needs, and should have, the opinion and services of a trained lawyer specializing in tax law. The need for clarifying and de-marking the appropriate fields and functions of the two professions, as to tax practice in which the services of both are needed in the interests of just and correct results for the client, are increasingly manifest, as is the need for agreement and team-work between them, as should be practicable. Controversy and suits in Court have not wholly solved the recurring problems.

This article is intended by its joint authors to be a constructive and helpful contribution to the prevalent discussion of the subject in both professions. They have worked long and earnestly in its preparation and revision; they have called extensively on their own experience and that of many others. Their draft was considered by members of our Association's Committee on Unauthorized Practice of Law, who recognized in it an opportunity to advance the understanding and solution of the problems. For that Committee, Edwin M. Otterbourg, of New York, long an outstanding exponent of the views of the organized Bar on the subject, worked in collaboration with the authors in their revisions and aided materially in the preparation of the comprehensive and useful footnote which brings together and reviews our Association's efforts to find amicable solutions for this and other overlappings between the lawyer's work and the claimed province of other professions, services and business.

We believe that our publication of this article will long be recognized as a landmark of progress in the efforts of accountants and lawyers to arrive at metes and bounds which can be mutually observed as means of assuring to clients the maximum

can and should make prior to trial, i.e., in the advisory and pre-litigation areas, in cooperation with the accountant, toward the successful handling of tax problems.[5]

Importance of Pre-Trial Cooperation Between Accountant and Tax Attorney

Most laymen and accountants recognize the desirability and necessity[6] of having an attorney thoroughly versed in federal taxes handle the trial of a tax case in Court, but few of them realize the extent to which team-work between the accountant and tax attorney, from the very inception of a taxable transaction, can be effective in minimizing tax liability. It is believed that the failure to appreciate this is largely due to a lack of comprehension of the basic fact that a tax case is most generally won or lost far before the trial of the case and that the actual litigation of that case starts long before the case ever gets into Court—in fact, from the inception of the taxable transaction. Let us therefore consider how and in what respect this is so.

There are four results to be accomplished through the benefit of timely and competent tax advice: (1) Before entering into a taxable transaction a taxpayer is entitled to (a) an informed opinion as to his resulting tax liability, without which he cannot make an intelligent decision as to whether to consummate the transaction; (b) if he decides to consummate the transaction, then he is entitled to the benefit of a method of accomplishing it which, under the applicable procedural and substan-

1. In Kentucky, where they are accustomed to "feudin' and fussin' ", the Attorney General on December 24, 1947, in a ruling addressed to Clarence Moore, of McKee, held that no one but a licensed attorney can fill out a federal or State return, if a fee is charged therefor. The Kentucky Bar Association has happily joined with the Kentucky Society of Certified Public Accountants in an attempt to have the Attorney General's ruling changed. In New York, the Appellate Division of the Supreme Court, First Department, recently reversed the decision of the Court below which had held that an accountant, apart from the regular pursuit of his calling, might give tax law advice for compensation. *New York County Lawyers' Association* v. *Bercu*, 273 App. Div. 524, 78 N.Y.S. (2d) 209 (April 12, 1948), reversing 188 Misc. 406, 69 N.Y.S. (2d) 730 (March 18, 1947).

Brief review of the history of efforts made by the Bar to iron out this as well as similar problems that have arisen from time to time in relation to the legal activities of other non-legal groups may be of interest. For more than ten years the American Bar Association and other Bar Associations have taken the position that there is room for both lawyers and accountants and, further, that there is a proper place for both of them in the field of taxation. Thus, as early as 1937 there were conferences between the Association's Committee on Unauthorized Practice of Law and a committee of the American Institute of Accountants for the purpose of formulating a statement of practice and activities constituting the unauthorized practice of law. A tentative draft was prepared by the Association's Committee and was considered by the committee representing the accountants.

The following year (1938) the Association's Committee gave its then "view" that seven activities were practice of law. It prefaced its statement by a general discussion in which it said:

"Experience has shown that in business problems involving questions of accountancy and questions of law it is advantageous to engage both an accountant and a lawyer and to let them adjust the division of effort and responsibility. This procedure assures the benefit of each practitioner's skill and judgment as regards matters within his grasp.

"Inasmuch as tax problems involve constantly both legal and accounting questions, the taxpayer's interests are generally adequately protected only when he engages the services of an accountant as well as a lawyer and arranges for their cooperation" (63 A.B.A. Rep. 325 [1938]).

The Association's Committee and the committee representing the American Institute of Accountants met in the fall of 1938 and discussed the former's conclusions. The accountants said they could not accept them. Another conference was held in April of 1939 and further conferences were scheduled. No agreement was arrived at, but the accountants offered to cooperate with the Bar in investigating complaints and setting up machinery for cooperative efforts to correct improper practices (64 A.B.A. Rep. 269, 270 [1939]). Nevertheless nothing further was done (32 A.B.A.J. 5, 7; January, 1946).

In 1944 the Association's Committee took the initiative again and recommended a national conference group similar to that organized in other fields, and reported, in part:

"Misunderstanding of the proper respective functions of accountants and lawyers in this service should be avoided. Each has his proper sphere and reasonable activity. Closer cooperation between the two professions is in the public interest (69 A.B.A. Rep. 469 [1944]).

The National Conference was approved on February 28, 1944, by the House of Delegates (69 A.B.A. Rep. 447, 448 [1944]) and by the Executive Committee of the American Institute of Accountants on March 22, 1944 (69 A.B.A. Rep. 263 [1944]). Upon its organization, on May 6, 1944, the Conference stated its objectives to be:

. . .

"2. To encourage cooperation between the two professions for the benefit of each and of the public.

"3. To consider misunderstandings involving fundamental issues between the two professions and recommend means for disposing of them" (69 A.B.A. Rep. 263, 264 [1944]).

At its second meeting on September 10, 1944, the Conference stated, in part:

"2. That it is in the public interest for lawyers to recommend the employment of certified public accountants, and for certified public accountants to recommend the employment of lawyers in any matter where the services of either would be helpful to the client; and that neither should assume to perform the functions of the other" (69 A.B.A. Rep. 189 [1944]).

At a Conference meeting on May 4, 1945, the Conference decided to sponsor the dissemination of information among members of the two profes-

of competent service. Incidentally, the article contains a lot of information as to angles of tax practice—law and accountancy—which members of both professions will find most helpful to themselves in their daily work.

The consequences of disagreement and controversy have been strikingly illustrated in what has recently taken place in Congress. In the preparation of the new federal Judicial Code, it was proposed and desired to make the Tax Court one of the Courts of the United States instead of merely an agency exercising judicial or quasi-judicial functions in the Executive branch of the government. This would have excluded accountants from appearing and conducting cases in the Tax Court. They sought to have the Congress command the Court to permit these non-lawyers to act as counsel before it. This was opposed by lawyers and judges as unsound in principle and practice. (See "Power To Admit to Practice Is Judicial", 34 A.B.A.J. 389; May, 1948.) An attempted compromise was to empower the Tax Court to admit to practice before it those accountants who had already been on its roster. This was not acceptable to the lawyers on the Senate Committee on the Judiciary; it was deemed to embody a "controversial" change in the existing law. So the whole provision to make the Tax Court a Court was striken out of the new Code. Meanwhile, by a separate enactment (Section 36 of Public Law 773 of the 80th Congress), not a part of Title 28 which is the new Judicial Code, the Congress passed and the President signed an amendment of Section 1141(a) of the Internal Revenue Code so as to reverse and override the rule of the *Dobson* case, 320 U.S. 489, discussed in this article, and to make decisions of the Tax Court reviewable to the same extent as decisions of United States District Courts in civil actions tried without a jury. So the Tax Court remains an administrative agency, accountants are not excluded from appearing and acting in the place of attorneys before it, and the decisions of the Tax Court are judicially reviewable as though it had been given the status of a United States District Court.

tive law, will assure him of the minimum tax liability, and which, in the event of dispute, will entitle him to the most favorable disposition by way of settlement, if possible, and, if not, by litigation in the Courts. (2) After a transaction has been consummated and the tax liability has been put in dispute, either because of no advice or because of improper advice secured prior thereto, the taxpayer is entitled to (a) an informed and intelligent evaluation, on the basis of the pertinent procedural and substantive law, as to whether to settle the case, and, if so, the best dollar-and-cents basis therefor to him; (b) in the event the case cannot be settled on the advised basis, then he is entitled from that point on to the benefit of every procedural and substantive advantage given him by the law toward securing a successful result in the litigation of the case.

Now let us consider the contribution to be made by a combination of a competent tax attorney and accountant in the successful achievement of these several objectives: (1) In respect to advice given before consummation of a tax transaction; and (2) with respect to advice given after consummation of the transaction, but before litigation.

Contribution of a Tax Attorney and Accountant Before Consummation of a Tax Transaction

The first objective of tax advice given prior to consummation of a taxable transaction is to give the taxpayer an informed opinion as to his resulting tax liability. Without this he cannot make an intelligent decision as to whether to consummate the transaction. Most tax problems involve, among other things, mixed questions of law and accounting, and depend, in the last analysis, upon an interpretation and construction of the pertinent provisions of the revenue acts, with a view to predicting the results of judicial application of them to the facts at hand.

The proper interpretation and construction of a Revenue Act, as applied to a particular problem, calls upon all the resources and technique at the command of a person who not only is trained in the general law, but who also is experienced in the special complexities of the tax law. It is beside the point of this discussion to go into a detailed consideration of the various steps involved in the process, but suffice it to say that the requirements called for generally do not permit a person who would master that phase of the problem also to master the intricacies of the accounting profession.[7] Accordingly, a complete and thorough evaluation of most tax problems, the kind of evaluation required to determine intelligently a course of action, calls for collaboration and complete cooperation between the accountant and tax attorney.

The second objective of tax advice given prior to consummation of a taxable transaction is to permit the transaction to be effected in such a manner as will, under the applicable procedural and substantive law, assure the minimum tax liability,

sions to demonstrate that in the field of taxation "collaboration between the lawyers and the accountant is indispensable to the public interest" (70 A.B.A. Rep. 267 [1945]). Unfortunately, the meetings of the Conference came to an end on December 15, 1945.

Conferences have been held between the Association's Committee on Unauthorized Practice of Law and the following groups of business and professional men: American Bankers Association Trust Division (65 A.B.A. Rep. 206 [1940]); National Association of Creditmen (63 A.B.A. Rep. 323 [1938]); Commercial Law League of America (63 A.B.A. Rep. 323 [1938]); representatives of Collection Agencies Operating Nationally (62 A.B.A. Rep. 771, 775 [1937]); Association of Interstate Commerce Practitioners (62 A.B.A. Rep. 771 [1937] and 63 A.B.A. Rep. 323 [1938]); National Association of Real Estate Boards (see conferences below); American Institute of Accountants (see conferences below); National Association of Life Underwriters (see conferences below); Committee Representing Casualty Insurers and Insurance Adjusters on Problem of Lay Adjusting (see conferences below); National Association of Broadcasters (66 A.B.A. Rep. 153, 269 [1941]); publishers of loose-leaf law services (66 A.B.A. Rep. 150, 269, 275 [1941]); publishers of law books, loose-leaf law services, etc. (72 A.B.A. Rep. 210 [1947]).

Permanent joint conference groups of lawyers and laymen are presently organized by the American Bar Association and the following lay groups: Conference Committee on Adjusters (64 A.B.A. Rep. 278 [1939]); National Conference Group with Trust Division of American Bankers Association (65 A.B.A. Rep. 206 [1940]); National Conference Group with National Association of Real Estate Boards (67 A.B.A. Rep. 218 [1942]); National Conference Group with American Institute of Accountants (69 A.B.A. Rep. 447 [1944]); National Conference of Lawyers and Life Underwriters (70 A.B.A. Rep. 119 [1945]).

Statements clarifying the respective positions of lawyers and laymen in specific fields have been issued by the Association's Committee or by the foregoing conference groups and have been voluntarily agreed to by the representatives of laymen involved: collection agencies (62 A.B.A. Rep. 771, 775, 786 [1937]; 63 A.B.A. Rep. 327 [1938]; 64 A.B.A. Rep. 274 [1939]); lay insurance adjustment (64 A.B.A. Rep. 278 [1939]); life insurance underwriters (64 A.B.A. Rep. 271 [1939]; 65 A.B.A. Rep. 211 [1940]); loose-leaf services (66 A.B.A. Rep. 275 [1941]; 67 A.B.A. Rep. 221 [1942]); broadcasters (66 A.B.A. Rep. 153, 269 [1941]); trust companies (66 A.B.A. Rep. 274, 277 [1941]); real estate brokers (67 A.B.A. Rep. 224 [1942]; 68 A.B.A. Rep. 132-141 [1943]; accountants (69 A.B.A. Rep. 189 [1944]); law books, etc. (72 A.B.A. Rep. 210 [1947]).

As a result of the Association's work, laymen are today advertising "Consult Your Lawyer", as referred to in 69 A.B.A. Rep. 448 and described with other examples of laymen's cooperation in 69 A.B.A. Rep. 264 and 265 [1944], 70 A.B.A. Rep. 260 [1945], and 71 A.B.A. Rep. 209 [1946].

2. See note, 56 *Yale L. J.* 1438, written prior to the decision by the Court in the *Bercu* case (cited in first paragraph of note 1) for the citation of some of the numerous writings.

The Appellate Division of the New York Supreme Court, in its opinion in the *Bercu* case, said:

> "An objective line must be drawn, and the point at which it must be drawn, at very best, is where the accountant or non-lawyer undertakes to pass upon a legal question apart from the regular pursuit of his calling. . . .
>
> "The line . . . allows the accountant maximum freedom of action within the field which might be called 'tax accounting' and is the minimum of control necessary to give the public protection when it seeks advice as to tax law."

If a line were to be drawn it would seem that the analogy between the functioning of the judge and the jury—the law and the facts—would be helpful, and the law has successfully dealt with this problem for centuries.

3. In order to overcome the experience and efficiency of the overworked and, unfortunately underpaid representatives of the government, the taxpayer who is in trouble, or wants to stay out of it, must use the very best combination of talent that is available. In this connection it should be noted that there is probably no group of employees in the federal government's service who produce more tangible results for the taxpayers as a whole, for each dollar expended on them, than the internal revenue agents working in the field. See report to the Joint Committee on Internal Revenue, pursuant to Section 1203(b)(6) of the Revenue Act of 1926, by the advisory group appointed pursuant to P.L. 147 of the 80th Congress, "Investigation of the Bureau of Internal Revenue".

4. See May, "Accounting and the Accountant in the Administration of Income Taxation," 47 *Col. L. Rev.* 377, at 397.

5. For an excellent statement of the functioning of the accountant in tax practice, see May, *idem.*

6. All cases in the federal Courts must be tried by a licensed attorney and practically all cases in the Tax Court are in fact tried by an attorney, although that is not required by the rules of that tribunal. From October 22, 1942, to June 30, 1947, the Tax Court promulgated 3170 written opinions, of which only 173, or 5.5 per cent, were handled by accountants. The repudiation of the *Dobson* rule by Congress, note 11 *infra*, suggests, by implication, that since hereafter Tax Court decisions are to be reviewed on the same basis as those decided by the District Courts, then presumably Tax Court cases should also merit trial by a licensed lawyer, fully cognizant of the technicalities and niceties involved in perfecting at the trial stage a fully reviewable record.

7. A person who succeeds in mastering both is indeed the exception, if not non-existent. See Shattuck, *An Estate Planner's Handbook*, xxi-xxix.

and will, in the event of dispute, entitle the taxpayer to the most favorable outcome by way of settlement, if possible, and, if not, by litigation in the Courts.

Here again, it is submitted, collaboration between the accountant and the tax attorney will prove the better part of wisdom in the long run for all concerned. In addition to being entitled to the benefit of the best and the least expensive tax method within the substantive law that the accountant and tax attorney can together find, the taxpayer is entitled to have the transaction set up so that from the viewpoint of the procedural law he will also be insured all the protection he is entitled to, and, in the event of dispute, be in a sound position to settle effectively or to litigate,[8] as the case may require. Since it is at this point that the record is, in effect, begun for any future trial, the taxpayer is entitled to the benefit of knowing at this time that he is forearmed, in the event of ultimate dispute in Court, with evidence that will stand the test of litigation. Forewarned is forearmed, and the best and surest way of preventing litigation is to be fully prepared therefor in advance.

A person experienced in the procedural requirements for litigating a case is best qualified to properly and effectively consider this phase of the problem. The fees for his advice may well prove cheap insurance in the event of a later dispute. A simple example will illustrate this point:

OLIVER W. HAMMONDS

Bill Williams

GEORGE E. RAY

Suppose an accountant is called upon to give advice to a corporation with respect to the deduction of the traveling expenses of its president. He can probably advise the corporation on the basis of the substantive law set forth in Section 23(a) of the Internal Revenue Code that it will be entitled to a deduction for all expenses in fact incurred by him away from home on the business of the company. However, unless the corporation is further advised that the making and keeping of detailed substantiative vouchers, records and checks is required, in order to have the kind of evidence that will meet the procedural requirements of the law in Court, it will find that when the deduction is later questioned by the revenue agent the deduction will be disallowed for failure of proof and litigation thereon will be of no avail.[9]

Any tax problem in the book—

(Continued on page 966)

8. As will be developed in detail below, an effective settlement is only achieved because of (a) a strong litigating position and (b) an intelligent evaluation of just how strong that position is.

9. *Hewitt Rubber Co. of Pittsburgh*, T. C. Memo Dec. 1947, CCH Dec. 16,162(M); *Le Sage et al*, T. C. Memo Dec. 1947, CCH Dec. 16,163(M).

Concerning the Authors: The "writing team" of George Einar Ray and Oliver W. Hammonds are also law partners under the name of Ray and Hammonds, in Dallas, Texas. Ray was born in Gloucester, Massachusetts, in 1910 and was graduated *magna cum laude* from Harvard University in 1932. He obtained his law degree at Harvard in 1935. He was admitted to the Massachusetts Bar in 1935, became an assistant to Professor Roswell Magill at the Columbia University Law School and was admitted to the New York Bar in 1936. He was an attorney with the United States Board of Tax Appeals, in Washington, D. C., during 1938-41 and a special assistant to the Attorney General in 1941, and was in the office of tax legislative counsel for the United States Treasury Department in 1941-42. He returned to Boston and was associated with the firm of Hale and Dorr in 1942-44. He was commissioned a lieutenant (j.g.) in the Supply Corps, USNR, in February of 1944, and served later in Army-Navy and State Department posts. In 1946 he went to Texas and formed his present firm. He is a lecturer at Southern Methodist University School of Law, and is Secretary of the Harvard Law School Association of Texas. He has been a member of our Association since 1947, and belongs also to the Dallas Bar Association and the Texas State Bar Association.

Hammonds was born in DeQueen, Arkansas, in 1911, and attended schools in Oklahoma, Culver Military Academy, and the Harvard Law School. For more than four years before he entered the Armed Forces in 1942, he was in the Department of Justice and had much to do with the preparation, trial and briefing of tax cases. He was admitted to the Oklahoma Bar in 1936 and to the Bar of Texas in 1946. He has been a member of our Association since 1946. His law practice is chiefly in the tax field. He and his partner have studied extensively in the field of tax accountancy also, and have written many articles, jointly and singly, as to tax law and practice.

6

The Annual Address:

"Our Lives, Our Fortunes, and Our Sacred Honor"

by Tappan Gregory • Retiring President of the American Bar Association

■ An inspiring recital of the beginnings and foundations of American independence as a nation and of the liberties later vouchsafed by our Constitution featured the opening session of the 71st Annual Meeting of our Association in the great Civic Auditorium in scenic Seattle, in the State of Washington, on September 6. It was contained in the annual address, delivered under the mandate of our Association's organic law, by Tappan Gregory, of the Illinois Bar (Chicago), as the climax of his notable year as President of our Association. He took as his theme the familiar quotation of patriotic pledge contained in the Declaration of Independence which proclaimed also that . . . "all men are created equal; that they are endowed, by their Creator, with certain unalienable rights"—rights which lawyers then confirmed in what they wrote into the Declaration, rights to which lawyers gave definitive statement as to persons and States and assurance of protection in the Constitution and Amendments to that document, rights for which American lawyers of all generations have been in the forefront of vigilance and defense. President Gregory brought back to mind by vivid chronicle the personalities of those who drafted the Declaration, worked and fought for independence, and laid the foundations for republican government and the rights of men. He told also the risks they took, the courage and common sense they manifested, the hardships they suffered, and the victories they won for us—a story that can never be told too often to American lawyers and people. In his concluding paragraphs he made some incisive present-day applications of the eternal principles which he had deduced from the Declaration and its history.

> And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

■ Brave words, pronounced by brave men, young men for the most part. No idle gesture this, no strident warning, no empty threat.

No illusion distorted the perspective of these men or clouded their vision. They saw clearly the stage they set and their parts in the forthcoming drama in all the grim austerity of its bleak outline, once eloquently timed "In that moment of darkness, of terror, and of consternation, when the election was to be made between an attempt at liberty and independence on the one hand, and defeat, subjugation, and death on the other".[1] Yet they did not falter, nor turn aside, but marched ahead together with steadfast loyalty to the undertaking for the success of which they had so soberly made their pledge.

They were bold to stand forth, a mere handful of intrepid and determined men of vision and unshakable faith, against the most powerful empire in the world. The profound significance of what they said and the depth of meaning in their words are not readily apparent except against the background of the times in which they lived, the manner in which they ordered their lives and accumulated their fortunes, and the extent to which they exalted their sacred honor, willingly prepared for sacrifice, if need be, on the altar of freedom.

Those hardy adventurers who came first to the terrain destined to constitute a part of the original Colonies, found difficulty enough in establishing a foothold on a narrow coastal strip, to occupy all their attention. It was not for them to penetrate the forests, to scale the mountains, to fight their way through great swamps and make crossings of swift rivers. Inhabitants of Virginia, of New England, of Maryland, New York, New Jersey, the Carolinas, Pennsylvania, and finally Georgia, were almost isolated, each group in its own small environment, with intercommunication even among individuals difficult in the extreme. As late as 1763 there were probably less than a million and a half people, free and slave, in all the Colonies together. The people of the Jerseys lived, some in the small towns,

1. William Wirt, *Eulogy on Jefferson, The Writings of Thomas Jefferson*, Vol. 13, page XXV.

operating small farms, others on large holdings. Many of them made their own clothes, using the wool from the sheep they raised, and constructed much of their own furniture and machinery. Domestic arrangements were primitive, with little in the way of light or heat. Homes of the colonists were, of necessity, practically cut off from the world beyond their own narrow boundaries.

Beginnings of Local Government and Commerce

It is interesting to observe the extent to which local governments varied in response to the influence of the different nationalities constituting the original settlers; to see, for example, the imprint of the Swedes and the Dutch, the latter intermingled with French, in Delaware; the influence of the English there, and then of the Scotch-Irish; the strength of the impression of the Delaware Quakers after having joined to Pennsylvania through a grant to William Penn. Delaware again went its separate way to become one of the original thirteen States, the first to adopt the federal Constitution.

In North Carolina the Gaels made their most lasting mark, torn though they were between their gratitude to the Americans who had taken them in, and the oath which they must needs subscribe when they arrived, to support King George and his government.

No one can forget the picture of Daniel Boone, born on the frontier of Pennsylvania, drawing his strength from the best of varied stock making up the sum total of his ancestry—English, German, Welsh, Scotch-Irish—his love of adventure and of the wilderness into which he trekked when still a boy, and the distinguished service he rendered in opening the way and blazing the trail leading to the settlement of that land later to become Kentucky—that rugged, wild territory held against the Indians by a great Virginian, George Rogers Clark, another stout-hearted youngster. Clark was only twenty-two when he became a member of the staff of Governor Dunmore of Virginia, and he it was who made a long, arduous journey back to Williamsburg too late to be seated as a delegate at the session of the legislature, but not too late to obtain several hundred pounds of much needed gunpowder and to persuade the new governor, Patrick Henry, and his legislators, to organize Kentucky as a County of Virginia. No less inspiring is the saga of two other young Virginians, James Robertson and John Sevier, architects of the Commonwealth of Watauga, pioneers in the development of Tennessee.

The Average American Home of Early Days

Even in those earliest days the first settlers made rapid and prodigious progress in the development of trade on the ocean, in the building of their occupation as merchants, in cultivating the land, carving out of the wilderness farms or plantations, depending on whether they lived in the north or the south. And towns and villages grew naturally as small, closely knit communities established to promote these varied activities. This is how the American home of that day has been described:

> The average New England country household was a sort of self-sustaining unit which depended little on the world beyond its own gates. Its equipment included not only the usual chairs, beds, tables, and kitchen utensils and tableware but also shoemakers' tools and shoe leather—frequently tanned in the neighborhood and badly done as a rule—surgeon's tools and apothecary stuff, salves and ointments, branding irons, pestle and mortar, lamps, guns, and perhaps a sword, harness and fittings, occasionally a still or a cider press, and outfits for carpentering and blacksmithing. The necessary utensils for use in the household or on the farm were more important than upholstery, carved woodwork, fine linen, or silver plate. . . They had no money to spend on unessentials, still less on luxuries, and from necessity they used what they already possessed until it was broken or worn out; then, if it were not entirely useless, they repaired and patched it and went on as before. . . Yet economical as these people were, even the unpretentious households possessed an abundance of mugs and tankards, which suggest their one indulgence and their enjoyment of strong drink[2].

In spite of the fact that there was little general schooling, philosophical differences developed among educators destined to persist down to the present, for there were those who believed that higher education should be devoted to vocational training, on the ground of its practical value in after life, and in preference to a liberal education in the classics. Much of the teaching in the elementary stages was carried on by tutors from abroad, while those able to do so quite generally pursued their higher education overseas.

Six Signers of the Declaration were Members of the Middle Temple

Six of the signers of the Declaration of Independence were members of the Middle Temple: Edward Rutledge, later to become Governor of South Carolina, the youngest signer, twenty-six years old; Thomas Lynch, Jr., a few months older; Thomas Heyward, Jr., later a judge, and Arthur Middleton—these four representing South Carolina in the Congress. Heyward was but thirty, Middleton thirty-three. The fifth, slightly older than these, was Thomas McKean, still only forty-two, representing Delaware. McKean was President of Delaware, the first Chief Justice of the Supreme Court of Pennsylvania, and later Governor of that State; Charles Carroll of Carrollton, entered the Middle Temple in 1751. He never practiced. William Paca, of Maryland, studied at the Inner Temple, and was admitted to the Bar in England in 1764 at the age of twenty-four. He returned to practice in the United States.[3]

Extemporizing of Publications, Transport and Occupations

It is hard for us today, living as we do in the midst of the wonders of scientific invention and development, to envision the hardihood of those busy pioneers who visited with each other with difficulty because of the lack of roads and transport, and who

2. Charles M. Andrews, *Colonial Folkways, (The Chronicles of America)*, Vol. 9, pages 64-65.
3. E. Alfred Jones, *American Members of the Inns of Court*, pages 187, 139, 97, 158, 148, and 165.

must depend for their news and much of their reading in general on almanacs and occasional expensive news sheets. Circulation, of course, was most difficult though there were some private circulating libraries.

It is surprising to find how many trades and occupations could be extemporized in default of experts. We are told that

> Joshua Hempstead of New London, for example, was not only a farmer but at one time or another, from 1711 to 1758, a housebuilder, carpenter, and cabinetmaker, shipwright, cobbler, maker of coffins, and engraver of tombstones, a town official holding the offices of selectman, treasurer, assessor, and surveyor of highways; a colony official, serving as deputy sheriff and coroner, many times deputy to the General Court, justice of the peace, and so performing frequent marriages, and judge of probate. He was also clerk of the ecclesiastical society, lieutenant and later captain of the train band, and surveyor of lands. He did a great deal of legal business, drawing deeds, leases, wills, and other similar documents, and was general handy man for his community[4].

Most of the travel, at first, was by water, and the development of adequate trails and roads to carry the populace westward overland was a long, tedious, but sure process. Some traveled in the pursuit of their trade, some in search of opportunity for education, some to satisfy a restlessness urging them ever onward where adventure or greener pastures beckoned. And every journey of any distance required days or weeks on the road. Trails were gradually widened and improved and lengthened so that there could be travel between the towns of the Colonies. At first there were few bridges. Rivers were crossed by fords, ferries and small boats. But the necessity of adequate roads in the carrying of the mails added great impetus to the development of highways.

The story of westward migration is an epic in itself, a tale of hardship, fraught with danger, not only in nature's reluctance to give way before the march of civilization, but in the ever-present menace of the Indian, who resented the trespass of the white man on his hunting grounds, and who, whatever his faults, can hardly be blamed for failure to understand the readiness of the white man to disregard his given word when advantage to him lay in this direction.

Early Discontent and Difficulties with British Government

It is not possible, in tracing the origins of discontent among the colonists and the first stirrings of the idea that independence might be desirable, to overlook small matters such as the annoying quitrents, nominal though they were, required of landholders by the King or by the great proprietors holding by grant from him.

The colonists were high-strung people and little by little some of the British practices began to corrode their spirit. They were restless under the habit of office-holders for the Colonies administering their official affairs from London and drawing their salaries without even looking upon the territories committed to their care.

George Grenville, as First Lord of the Treasury, in England, moved to correct this abuse through directions to the Commissioners of the Customs.

More serious difficulties developed in making provision for the necessary defense of the Colonies. Troops were sent from England to be maintained at the cost of the Americans, and it was to provide funds for this purpose that plans were laid in 1763 for the imposition of Stamp Taxes in America. This was the beginning of twelve years of growing dissatisfaction, culminating finally in the realization that there must be a definite break between the Colonies and the mother country. Pitt had refused to support the levying of such taxes, and Grenville appeared rather reluctant, though he did refer to the possibility in his budget message in 1764.

The Challenge of Taxation Without Representation

From the very first, the colonists objected, and they considered specious and unsound the argument that their interests were adequately represented in the Parliament and their consent implicit in approval by their Parliamentary representatives. Nevertheless, the Stamp Act came into being in 1765, providing for the use of stamped paper for manifold purposes.

Samuel Adams, then about forty-three, apprehensive of the extent to which the principle of the legitimacy of taxation without representation might in the future be applied to the Colonies, staunchly and vigorously denied the validity of this procedure lest its extension might deprive the Colonists of their free status.

Writing of Adams in 1819, Jefferson said:

> I can say that he was truly a great man, wise in council, fertile in resources, immovable in his purposes, and had, I think, a greater share than any other member, in advising and directing our measures, in the northern war especially. As a speaker he could not be compared with his living colleague and namesake, whose deep conceptions, nervous style, and undaunted firmness, made him truly our bulwark in debate. But Mr. Samuel Adams, although not of fluent elocution, was so rigorously logical, so clear in his views, abundant in good sense, and master always of his subject, that he commanded the most profound attention whenever he rose in an assembly by which the froth of declamation was heard with the most *sovereign* contempt[5].

Virginia Debates as to Legitimacy of the Stamp Tax Act

Even as the Stamp Act was passed, Patrick Henry, twenty-nine years old, prepared several resolutions for presentation to the Virginia House of Burgesses. They were adopted in protest of the Act. Upon reconsideration, apparently in the absence of Henry, their severity was tempered. It was during the debates on these resolutions that that famous passage occurred in which Henry said: "Caesar had his Brutus; Charles the First, his Cromwell; and George the Third—" At this point the cry "Treason!" rang out and Patrick Henry continued—"*may profit by*

(Continued on page 969)

4. Andrews, *op. cit.*, pages 179-180.
5. *The Writings of Thomas Jefferson*, Letter to Wells, Vol. XV, page 201.

7

Administrative Law:

Further Improvements in Agency Procedure

by **Alexander Wiley** • Chairman of the United States Senate Committee on the Judiciary

■ The 1948 Annual Meeting of our Association will be long remembered for many things, among which is the formal launching and organizing of earnest efforts by our Association to implement the Administrative Procedure Act, assure the accomplishment of its objectives, and initiate further steps to eliminate defects in agency procedures and abuses in agency administration in the federal government and in the States. This and our November issue will bring to our readers further informative details of specific measures which will receive active support from our Association. Appropriately, and as earnest as his whole-hearted interest in the remedial proposals in this field of law, the distinguished Chairman of the United States Senate Committee on the Judiciary, diligent member of our Association since 1923, came to Seattle to discuss with those present the pending and prospective legislation in the Congress. Speaking at a notable breakfast of the Section of Administrative Law, held at that early hour on September 7 to avoid the many overlappings due to the congested calendar of meetings, Senator Wiley outlined informatively the "continuous improvement in administrative justice". The *Journal* has never looked with favor on the phrase "administrative justice", because we know of but one kind of justice under law, whether it be in Courts or agencies; but Senator Wiley made it clear that his adherence is to the truly American concepts of law and justice in agency rules, proceedings and decisions, and that he and his associates in the Congress are disposed to seek continuous improvements.

Successively, he expounded the abuses which arise through arbitrary powers in the agencies; the specific steps to be taken to implement and fortify the Administrative Procedure Act; the pending process of "screening" and selecting some 200 Hearing Examiners under the Act (34 A.B.A.J. 847; September, 1948); the administration, regulation and discipline of practitioners before the federal agencies; the new movement for uniformity in rules of procedure for the agencies, to which Chief Justice Vanderbilt, of New Jersey, gave his primary attention at the Seattle meeting; and the need that Congress be vigilant in assuring that the substance and reality of adequate judicial review, vouchsafed by the Act, shall not be whittled away, impaired, or withheld, by Courts or agencies. The last of these is a subject on which President Frank E. Holman had made clear the attitude of our Association in his "pre-induction" statement to the *Journal* (34 A.B.A.J. 757; September, 1948) and again on page 927 of this issue.

Senator Wiley's address was forward-looking and notably significant. Our members will be grateful to him for selecting our meeting as the occasion and forum for making such a statement by way of forecast of further measures for assuring justice and fair play for the millions of our people whose lives and work are vitally affected by the administrative agencies.

■ I express my appreciation for the opportunity of being with you at this fine gathering. It is a pleasure to meet again with our great organization and, in particular, its membership here on the West Coast. Such a meeting provides a special opportunity for a legislator from the Midwest to get acquainted with the tremendous growth that has made the Pacific Northwest a *new frontier* in American society—an expanding civilization making an invaluable contribution to American prosperity.

The problem I am to discuss with you is a challenging one—continuous improvement in administrative justice. We cannot approach it with fears or doubts or anxieties. Rather it is for us to demonstrate *real leadership*, by confidence and faith in the future of American administrative justice. We have faith that each of you will prove adequate to your task in the new frontier of administrative law which is only beginning to develop but which is already of tremendous significance to American law and to all of American society.

Before we get to the heart of our subject, I wish to present a few brief comments regarding the general

ALEXANDER WILEY

challenge to you and to me in these times. You know that from every side today we hear voices of gloom, of dissatisfaction, of discontent. There are those who would stampede the thinking of our country into chaos and confusion. In every age there have, of course, been serious problems. Today it is the problem of high prices and the problem of America's relations with Russia. In former years other problems proved the principal challenges. Yet, many times, as I have looked from my window in the Senate Office Building in Washington, I have been impressed by the fact that our great Capitol has survived not one great problem, but dozens of problems throughout its history.

There come to mind the words of the philosopher that "all things pass with time". Yet the republic remains stronger, sounder than ever before. Sometimes, if you and I get a bit weighted down with the burdens which seem to press upon us, we might remember that fact and remember that the battle "is not ours but the Lord's". So let us stand fearlessly fronting the challenge of this day—clear-eyed and with clear vision. Even the battle for improvement in administrative justice is in a sense the Lord's battle. Why? Because it involves the freedom of human beings. It involves their pursuit of happiness, the right and privilege to make for themselves a more abundant life, free insofar as possible from government regulation, but where government regulation proves necessary, free to deal with such regulations in a systematic, orderly way—a way in which the administrators of those regulations prove to be *servants* of the people rather than try to be "little Caesars" or masters of the people.

Administrative Agencies as an Expanding Field of Justice

You and I know that ours is a *dynamic* legal system, not a static system. From every one of our State legislatures and from our national legislature pours a continuous stream of laws. Many if not all of these laws involve execution or a change in execution by some administrative agency. Laws do not implement themselves. It requires human beings to fulfill them, to interpret them, to define them for the people in the grass roots of America.

There is hardly a single important bill passed by the 80th Congress, for example, which did not involve the actions of some administrative agency—the Atomic Energy Commission, the Selective Service Administration, the Office of Housing Expediter, the Treasury Department, the Labor Department, and every other government instrumentality. It is important for every legislator to remember that ultimately the words of the laws that he helps to write and enact will have some impact upon the individual citizen. Will it be a fair impact or an arbitrary one? Will it be helpful or harmful? Will it be puzzling or clear? Will it be simple to administer or difficult?

Dangers of Arbitrary Administration of the Laws

The legislator must always be on his guard—but so, too, must the administrator. We must make sure that the administrator fulfills the *letter and the spirit* of the Congressional mandate. Too often in the past, administrators have chosen to disregard the Congressional mandate, to twist, to distort, to misinterpret that will of the people as expressed by Congressional legislation.

We know too that even for those administrators who try honestly to do a fair and efficient job in accordance with legal requirements, they face the problem of bureaucratic "dry rot" which seems to be a perpetual problem of government, whatever its form. We, a nation of 143,000,000 people have a federal establishment of 2,250,000 employees. Always, in every government, there are tendencies for federal employees to become dictatorial or tyrannical if their power is not appropriately checked, defined and delimited. This is a part of the great American system of checks and balances—balances between the legislative branch which makes policy and the administrative branch which executes it. Unless there are these checks and balances, unless Congress keeps close tabs on how the legislation it writes is fulfilled, then "government by law" becomes replaced by "government by men" and the legislation which was supposedly for the freedom and prosperity of our citizens becomes a mockery, a farce, and an instrumentality for their enslavement.

Administrative Procedure Act Leaves Further Steps To Be Taken

A tremendous milestone was reached when Congress passed the Administrative Procedure Act in the 79th Congress. You are aware of the long and conscientious labors performed not only by the members of Congress, but by leading representatives of the American Bar Association, by government officials, and by others, who sought to make that law an instrument of checks and balances, an instrument for legal *progress* rather than for legal stagnation.

But the Administrative Procedure Act, like the very evil which it sought to correct, requires administration itself, interpretation and implementation. In fact, there were four basic steps involved in this process:

(1) The proper interpretation and *enforcement* of the Administrative Procedure Act;

(2) The appointment of "quali-

fied and competent *Examiners*" to hold hearings and make or recommend decisions in formal administrative cases;

(3) The adoption of an adequate statute regulating *admissions* to administrative practice, fixing or providing a means for fixing the standards and ethics of administrative practice, and providing disciplinary machinery; and

(4) The formulation and adoption of *uniform rules* of administrative procedure for federal agencies.

I have already briefly discussed the general problem of (1). Later on I will mention a fifth significant problem. Now I shall take up item (2) relating to the appointment of the corps of "qualified and competent" hearing officers for federal agencies, as defined under the Administrative Procedure Act.

Selection of Qualified Hearing Examiners Is a Task at Hand

As you know, these Examiners are given unusual security of tenure as well as protection insofar as their compensation is concerned. They are to be appointed only through Civil Service examination and must meet the special requirements that are implicit in the Administrative Procedure Act. Generally speaking, they will be independent judicial officers.

The Civil Service Commission has made considerable strides toward the appointment of this immense corps of officers. It has done so in a number of steps: (a) It appointed an Advisory Committee composed largely of government representatives; (b) it received recommendation of that Advisory Committee; (c) it proceeded to hold an open hearing regarding Examiner qualifications; (d) the Commission issued skeleton regulations regarding the Hearing Examiner appointments; (e) it issued Examining Circular EC-17 in which it set forth qualifications on general and special experience; and (f) it appointed a distinguished Board of Examiners who are to determine two questions: (1) Which of the incumbent hearing officers are to be retained, and (2) what outside applicants should be deemed qualified to fill such vacancies as may exist.

Hearing Examiners Will Perform Functions Equal to Those of Courts

You are familiar with the outstanding competence of this Board of Examiners, which is composed exclusively of leaders from outside the federal government—State Supreme Court justices, eminent lawyers, and others. All told, the members of the Board total fifteen and work on a regional basis. They are confronted with the problem of the filling of around 200 Hearing Examiner positions. It is my understanding that the Board intends to complete its duties well before the end of this calendar year.

I would not presume to present any final conclusion regarding the ultimate decisions of the Board. You and I have every hope that the outstanding caliber of the Board will be reflected by the outstanding caliber of its decisions, meaning that the nation will secure a corps of Hearing Examiners who will possess those qualifications—competence, efficiency, objectivity, fairness, loyalty to the American way of life and the American system of free enterprise—which are so urgently required for these outstanding posts.

I need not impress upon you the fact that these Examiners will determine the course of justice in cases which will actually be *equal to or of greater consequence* than those which come up before federal trial Courts. If these Examiners measure up to the high standards which we hope they will, they will impart *an improved tone* to the whole administrative process.

Regulation of Administrative Practitioners Is an Important Pending Measure

Coming now to (3) I would like to set forth the history of Congressional consideration of this matter of the regulation of administrative practitioners. In the 80th Congress, the House of Representatives took the lead by holding extensive hearings on H.R. 2567. At the same time, a Committee print of the same bill was prepared for the study of my own Senate Judiciary Committee. Later on the House Judiciary Committee redrafted H.R. 2567 into a new bill known as H.R. 7100. Of course when the 81st Congress convenes next January, this bill, or one very similar to it, will be dropped back into the hopper.

Undoubtedly most of my listeners have already read the details of this proposed measure in the JOURNAL. I therefore only briefly summarize it as to four principal points:

(1) The simplification of requirements for the *admission of lawyers* to administrative practice;

(2) The prescription of requirements for the *admission of non-lawyers* to practice in informal cases;

(3) The application of rules and standards of *professional ethics* for lawyers and non-lawyers alike in this field; and

(4) The devising of a system for discipline of administrative practitioners.

Each of these constitutes a very worthy and far-reaching objective and one toward which the organized cooperation of the Bar will have a very important effect.

The Urgent Need for Uniform Rules of Practice

I have thus far discussed all of the matters which have a certain amount of legislative history. We come now to perhaps the most important and challenging phase of our subject; namely, the formation of uniform rules of practice for administrative agencies. This constitutes the very essence of what the American Bar has been seeking for nearly twenty years. Prior to this meeting it has not been publicly discussed, although it is quite obviously a climax to the recent efforts for improvement of the administrative law system. In fact, it is a climax to the effort at rule-making which began in 1934 when formulation was begun of the Uniform Rules of Civil Procedure for the federal trial Courts.

Uniform rules of *administrative* practice and procedure are actually more necessary than even in the

judicial system. Administrative agencies have country-wide jurisdiction over 145,000,000 people. On the other hand, our federal Courts, although dealing with matters of utmost significance, have primarily a *local* jurisdiction. Just contemplate for a moment the fact that we have sixty or seventy important federal regulatory agencies and that lawyers in dealing with them confront sixty or seventy different sets of rules of administrative practice, in their efforts to practice federal administrative law. Each of these sets of rules vary. Some are detailed; some are fragmentary, even to the point of virtual non-existence.

Turmoil and Confusions Result from Diversity in Rules

The effects of such extreme diversity are obvious. In the first place, administrative justice becomes far more expensive than it should be otherwise—expensive in time-processing, in manpower. To keep abreast of the diversified administrative system proves discouraging to anyone, even the most experienced administrative lawyer. In fact, this extreme diversity has deprived many people of the representation they are entitled to from the Bar in administrative cases.

Secondly, diversity causes constant *turmoil and confusion.* When you look at the situation, you see a picture of details changing here in one agency, topics being added there in another agency—whole rule books being rewritten sometimes without apparent plans. The voluminous pages of the *Federal Register* record this chaos of diversity as the stream of new regulations, amended regulations, substituted regulations pours on.

We are not striving at uniformity merely for the sake of uniformity. We do seek order out of chaos, but not at the expense of such diversity as may actually be necessary because of the peculiar nature of particular agencies. We know that there is a tremendous degree of uniformity that must reasonably and justifiably be obtained so that lawyers will know better how to proceed to secure or define the rights of their clients. When we have attained this objective of *reasonable uniformity,* we will have taken a vast step in getting the mystery, the discouragement, the frustration out of administrative law operations. What we will be doing in effect is translating the fundamentals of the Administrative Procedure Act into the operating details of the administrative process.

Obstacles to Uniformity Can Be Overcome

You and I know of the tremendous number of obstacles confronting us as we seek reasonable uniformity. We know the difficulties involved. We know the diversity of such matters. But after all, all of the Courts themselves handle a diversified business; yet they find uniform rules helpful. The Bar handles a tremendous diversity of cases, yet it finds uniform rules helpful. Why, then, should not the rule of uniformity be applied insofar as possible to administrative agencies and practitioners?

Judicial Review Is Imperative for Vitality of the Act

We have discussed four phases of the Administrative Procedure Act. I have referred previously to a fifth phase. It is the matter of judicial review—the imperative means by which full vitality shall be given to the provisions of the Act by the Courts. Not long ago, I received a very fine letter from the distinguished Editor-in-Chief of the AMERICAN BAR ASSOCIATION JOURNAL, Judge William L. Ransom, with whose invaluable services you are all familiar. Judge Ransom pointed up this problem by urging legislative assurance to our citizens of

> the substance and reality of plenary review by law-governed Courts. "Judicial abdication and agency manipulation" are defeating and denying the intended actuality of review.

I wish, in turn, that time permitted me to amplify on the tremendously significant matter which he raised, but in this instance, as in the instance of other important phases of the Act, we must defer consideration because of lack of time.

Although we are seeking the improvement of administrative justice, we do *not* want to do it at the price of complicating legal affairs. On the contrary, we are seeking *simplicity,* knowing that simplicity usually constitutes the key to improvement in our entire judicial and administrative system.

Every time we are able to cut the complicated "dry rot" that accumulates in administrative law, we free that many government employees from working under the burden of that rot. We free lawyers and their clients to do other creative work and engage in their business or legal activities toward other ends. Thus we increase in effect the *manpower potential* and the *production potential* of the nation.

Human law is a human mechanism, subject to change by human beings. As the race grows and develops, it reflects growth and development in law. Static law suggests a frozen society. Law, like every other thing human, should with judgment and vision be altered to meet changing conditions. Free men are best able to meet a changing world because they have learned to subject themselves to their own laws.

I end on this note of the great *frontier* which awaits—the legal and administrative frontier challenging us, beckoning us to set new standards of uniformity, of simplicity, of clarity, of efficiency. Here in this great city of the Northwest, we can see the meaning of the new frontiers clearly. But throughout our entire land, there is a legal and administrative frontier, as well as an economic, political and social frontier. To the American there are *always* horizons ahead, beckoning him onward. We say of the generations that preceded us: "They were adequate to the tasks that they faced".

May it be said of us by the young lawyers of today and the unborn lawyers of tomorrow, and by the unborn citizens of the America of the future: "They were adequate to the challenge of their time. May we continue blazing paths in our frontier of today."

8

Declaration on Human Rights:

Canadian, American Bars Ask Delay of Action

■ Through actions voted at the 1948 meeting of the Canadian Bar Association in Montreal the end of August and by the House of Delegates of our Association in Seattle on September 7, those two great organizations of the profession of law in North America have resumed their active cooperation in the field of international law, have initiated a program for joint study of the revised Draft Declaration on Human Rights now before the General Assembly of the United Nations, have each expressed the opinion that the revised Draft is not in contents or draftsmanship suitable for adoption by the Assembly or acceptance by member nations, and have each asked that Assembly action on the revised Draft Declaration as well as the Draft Covenant be deferred until there has been further study of the documents by the lawyers and people of the respective countries. The Chairman and two members of the Canadian Committee were in Seattle to confer with members of our Association's Committee on plans for joint work. Thus there is good prospect of a resumption of that active cooperation between the two Bar Associations which in 1945 was so effective as to the World Court and the improvement of the Statute of the Court.

In addition to the action voted without dissent as to the revised Declaration, the House of Delegates took action also as to the Pact of Bogotá for the pacific settlement of controversies that may arise between republics of this hemisphere, and urged that in consenting to the ratification of the Pact, the Senate relinquish and withdraw the reservations attached by the United States delegation to their signing at Bogotá. The House of Delegates voted unanimously to approve and support the program of the United States delegation and the "Little Assembly" (Interim Committee) to obtain agreement to eliminate or lessen abuses of the "veto" in Security Council voting, and recommended also that if such an agreement is not secured, an amendment of the Charter be drafted and submitted for ratification to remove from the scope of the "veto" the admission of new members to the United Nations and the taking of steps for the pacific settlement of controversies between nations and threatened breaches of the peace. Incoming President Frank E. Holman has been an active member of our Association's Committee for Peace and Law Through United Nations since its establishment in 1944; he took part in conferences with the Canadian representatives and emphasized in Seattle that he regards the Committee's work as one of our Association's major tasks for the present Association year. The full text of the Revised Draft Declaration, in the form now pending before the General Assembly, is on page 910 of this issue, along with a translation of the grounds stated by the Soviet Union for its abstention from voting as to the Declaration.

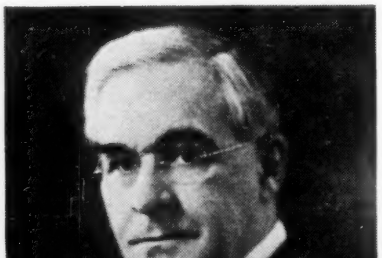
■ The House of Delegates considered and acted on the report and recommendations of the Committee for Peace and Law Through United Nations at the opening of the second session of the House in Seattle on September 7. For the Committee, Chairman William L. Ransom submitted the report, which was joined in by Frederic M. Miller, of Iowa; Frank E. Holman, of Washington State; Reginald Heber Smith, of Massachusetts; Judge Orie L. Phillips, of Colorado; M. C. Sloss, of California; George A. Finch, of Maryland; Carl B. Rix, of Wisconsin; and President Tappan Gregory, *ex officio*. Charles W. Tillett, of North Carolina, did not sign the report or file a dissent from it.

"There are many aspects of the international situation which cause grave concern to American lawyers and the American people at this time," the report declared. "In our opinion our Association may most usefully confine its present action to three matters which may be deemed especially within the province of the members of the profession of law."

Debate and Division as to Ratifying the Pact of Bogotá

The Committee's first recommendation was as follows:

> RESOLVED, That the American Bar Association recommends and urges that the United States ratify, and that the Senate of the United States consent



JOHN T. HACKETT
Chairman of Canadian Bar Association's Committee on Legal Problems on International Organization for Maintenance of Peace.

to the ratification of, the Pact of Bogotá for the pacific settlement of controversies arising between nations in the Americas, pursuant to procedures established in that Pact and for the reference to the International Court of Justice of juridical disputes within the categories enumerated in Article 36 of the Statute of the Court, if and when the regional procedures under the Pact fail to accomplish a settlement or determination.

RESOLVED FURTHER, that consistently with its reiterated attitude of opposing the Connally Amendment and urging the withdrawal of its reservation from the United States Declaration accepting the jurisdiction of the International Court of Justice, the American Bar Association recommends and urges that in ratifying the Pact of Bogotá, the United States should relinquish and withdraw the reservations attached to the signing of the Pact by its representatives at the Bogotá Conference of American States.

Concerning the foregoing the Committee said that the Bogotá Pact establishes "much improved methods for the mediation or arbitration of controversies between nations of the Americas by regional procedures which do not involve the participation of European or Asiatic nations. Only if these procedures do not produce a settlement or determination of a controversy, juridical disputes are to be referred to the World Court and non-juridical controversies to the Security Council of the United Nations." (See 34 A.B.A.J. 577, July, 1948; 34 A.B.A.J. 800, September, 1948.)

As to the reservations, the Committee advised the House:

> The reservations attached by the United States representatives have as their principal purpose
>
> (1) To qualify and limit the United States acceptance of jurisdiction and submission to adjudication, as did the Connally Amendment to the United States Declaration as of the World Court, by reserving to the United States the unilateral power and right to decide for itself what matters are excluded because deemed by the United States to be within its "domestic jurisdiction".
>
> (2) To abstain from commitment to submit controversies to arbitration unless there is made a separate and special agreement to arbitrate the particular controversy.
>
> The action of the United States representatives led several other nations to attach like conditions to their signing, thereby weakening if not imperilling the whole project for assuring the pacific settlement of disputes between American nations.
>
> Your Committee sees no reason why the vitiating principle of the Connally Amendment, opposed by our Association, should now be extended and carried into the pacific procedures for peace and law in the Americas. If our country is still unwilling, in its dealings with other republics of this hemisphere, to agree to the law-governed determination of legal disputes without reserving to itself a unilateral right to decide what controversies to which it is a party shall be submitted for such a determination, it cannot be said that the United States has yet given a reasonable adherence to international law and adjudication and to the basic principles of peace, justice and law under international organization.

Section of International Law Urges Revision of Bogotá Pact

When adoption of the first part of the above-quoted resolutions had been moved, W. B. Cowles, of Nebraska, delegate of the Section of International and Comparative Law, criticized the Pact of Bogotá, particularly its Article VII as to the protection of American nationals abroad, and offered for the Section the following substitute for the first part, although he said the Section supported the second part of the resolution:

> RESOLVED, That the American Bar Association suggests the reconsideration by the United States government of the American Treaty on Pacific Settlement, signed at the Ninth International Conference of American States at Bogotá, Columbia, on April 30, 1948, because of the ambiguities contained in the text of this Treaty; because Article VII of the Treaty may in effect adopt the Calvo Clause and deny the international responsibility of the state for the protection of the life and property of foreigners; and finally, because the reservations appended to the Treaty by the delegation of the United States reserves to the United States government the right to determine unilaterally whether the International Court of Justice has jurisdiction over a controversy, thus substantially nullifying the obligation in the Treaty to submit a case to judicial settlement.
>
> RESOLVED FURTHER, That the American Bar Association suggests that the government of the United States give consideration to the convening in Washington in 1949 of a special pacific settlement conference of American states composed of the most highly qualified jurists as delegates, to renegotiate an effective, unambiguous and progressive American treaty on pacific settlement free from the retrogressive provisions contained in the treaty on this subject which was signed at Bogotá on April 30, 1948.

Original Motion and Substitute Are Referred for Further Study

Debate as to the motion and substitute ensued. The Committee expressed doubt whether the Pact was open to the Section's objection. Former President Clarence E. Martin, of West Virginia, moved that the original motion and substitute be referred to the Section for study and report. This was carried, on a close division in the House. Mr. Martin then moved that the Committee, created by the House in 1944, be abolished, as overlapping the work of the Section. This was debated, and was defeated by a large margin of votes.

The second part of the resolution recommended by the Committee, as above set forth, was then adopted, with a few votes in the negative.

U. S. Position in Favor of Limiting the "Veto" Power Is Supported

The Committee's second recommendation was self-explanatory (see 34 A.B.A.J. 691; August, 1948; 34 A.B.-

A.J. 585; July, 1948), and was adopted by vote of the House of Delegates, without dissent, as follows:

RESOLVED, that the American Bar Association strongly supports in principle the efforts of the government of the United States and the Interim Committee ("Little Assembly") of the United Nations to remove or lessen abuses of the so-called "veto power" in voting in the Security Council of the United Nations, and urges that all practicable efforts be made by the General Assembly to obtain agreement among all of the member nations having permanent representation in the Security Council: (1) That enumerated categories of decisions by the Security Council are "procedural" within the meaning of the Charter and so not subject to the "veto"; (2) that other and additional categories of decisions may be adopted by the vote of any seven members of the Council, irrespective whether such decisions are "procedural" or non-procedural; and (3) that the permanent members of the Security Council consult, wherever possible, concerning important decisions to be made, and exercise the "veto" only where they regard the question as of vital importance to the objectives of the United Nations as a whole as well as to their own nations.

RESOLVED FURTHER, That the American Bar Association is of the opinion that if it is found that agreement and cooperative action along the lines of the foregoing cannot be secured among the five nations having permanent representation in the Security Council, steps should be taken at this time to draft and submit to the member nations for their ratification according to their respective constitutional processes a convention which, if so ratified, will amend the Charter so as to remove from the scope of the "veto" power of any one nation the admission of new members and any steps taken for the pacific settlement of international disputes and situations pursuant to Articles 33 and 34 of the Charter.

Recommendations Submitted as to the Revised Declaration

The Committee's third recommendation to the House read as follows:

RESOLVED, that the American Bar Association is of the opinion that the Draft Declaration on Human Rights as revised by the United Nations Commission on Human Rights, and the Draft Covenant on Human Rights, are not in such contents or form as to be suitable for approval and adoption by the General Assembly of the United Nations or for promulgation and acceptance by the United States and other member nations.

RESOLVED FURTHER, That to enable the study of the revised texts of those draft documents by the lawyers and people of the member nations, the American Bar Association is of the opinion that action upon the Draft Declaration as submitted to the General Assembly by the Economic and Social Council, and upon the Draft Covenant when consideration and revision of it is resumed, should be deferred by the General Assembly of the United Nations until its regular session in 1949.

RESOLVED FURTHER, That the American Bar Association is of the opinion that any Declaration on Human Rights should not be in any manner approved, accepted or promulgated by or in behalf of the government of the United States except upon and after the submission of such document to, and the approval of it by, the Congress of the United States.

RESOLVED FURTHER, That the American Bar Association, through its Special Committee on Peace and Law Through United Nations in conjunction with the appropriate Sections and Committees of the Association, is authorized to continue its cooperation with the Canadian Bar Association, through its appropriate Committee, in the further study of the drafts of those documents and the formulation of joint recommendations concerning them in behalf of the two Associations.

Revised Declaration Now Before the General Assembly in Paris

Members of our Association will recall that at its meeting last February, the House of Delegates had before it a preliminary draft of a Covenant on Human Rights and a Draft Declaration on Human Rights, together with a proposal of Measures for Implementation, all as prepared by the Commission on Human Rights (34 A.B.A.J. 200 and 204; March, 1948). In view of the preliminary and tentative character of those drafts, the House of Delegates took action only as to the proposed Measures for Implementation and voted disapproval of their principal features (34 A.B.A.J. 277 and 301; April, 1948). These views were communicated to the United States Department of State, the United States Delegation to the United Nations, and the Commission on Human Rights, and "appear to have been heeded to a substantial extent", the Committee reported, and added that study and discussion of the drafts have been continued by and within the Committee, and have been taken up also by numerous State and local Bar Associations, as has been reported from time to time in the JOURNAL. "Gradually but unmistakably", the Committee said, "members of our profession, along with other citizens, have become aware of what would be involved in the proposed Declaration and Covenant, if they were promulgated and made effective, and have manifested increasing concern about them". Comprehensive studies of the successive drafts have been made by a subcommittee headed by Frank E. Holman, with the aid of a study group of lawyers and professors in Seattle and Washington State. Results of the most recent study have been brought to the attention of appropriate United States officials. The Committee's report said further:

> The resolutions submitted by the signers of this report reflect their belief, from their study of the Commission's revised draft, that it is not in contents and draftsmanship suitable or ready for the action of the General Assembly and that further time to the extent of at least a year should be allowed for the study of the document by the lawyers and peoples of the member nations. It took several years of diligent study and careful drafting to formulate the American Bill of Rights. The Economic and Social Council of the United Nations has submitted the revised Draft Declaration to the General Assembly without change or recommendation. The Draft Covenant as it stands has been transmitted for information. The General Assembly convenes in Paris on September 26, and there is strong political pressure from at least our own country for early action on the Declaration.

Joint Study and Recommendations by Canadian and American Bars

After referring to the action voted by the Canadian Bar Association a few days before, and supporting the idea of a joint study and action by the two Associations, the Committee reported that "We have withheld more detailed analysis of and comment on the Draft Declaration and Draft Covenant in the belief that

they may best be the results of joint study and action in behalf of the two Associations". The Committee concluded its report on the revised Draft Declaration by saying:

> The present issue has a further aspect which deserves the consideration of the lawyers and people of the United States. The proposed Covenant would be a treaty; under our Constitution (Article VI), a treaty becomes "the *supreme* law of the land", binding the judges of every State and superior to the Constitution and laws of every State and at least the laws of the United States. That would have indeed serious implications and impacts which should be considered and weighed by the American people.[1]
>
> It is reported that the proposed Declaration, if approved and adopted by the General Assembly this fall in Paris, will be submitted to the member nations in such form that it need not be ratified by the member nations according to their respective constitutional processes, but may be accepted, approved and promulgated by the government of any country—in ours, the executive branch—without the action of the national legislature. It is hard to believe that such a course is contemplated and will be sustained by the General Assembly. In the opinion of the signers of this report, such a method of acceptance and approval by the government of the United States this fall would put the Declaration in a highly anomalous position under our Constitution and laws, and would leave the door open to Supreme Court decisions and executive actions that would give to the Declaration unforeseeable, and perhaps highly objectionable, implications and effects. For example: Subjects on which the United Nations has acted, and as to which the United States has assented, might be deemed to have been withdrawn from "domestic jurisdiction" in some or many respects. In this aspect the issue as to the Draft Declaration on Human Rights is a part of the larger issue which was discussed in an editorial at page 698 of the August issue of the JOURNAL: "International Legislation Without the Consent of Congress?".
>
> The signers of this Report are emphatically of the opinion that our Association should go on record at this time as opposing any manner of acceptance or approval of the proposed Declaration by, or in behalf of, the government of the United States unless and until the document has been submitted to, and approved by, the Congress of the United States.

The resolutions submitted by the Committee were then put to a vote by the House and were adopted, with no votes in the negative heard.

Canadian Bar Association's Action Along Similar Lines

Upon the recommendation of its Committee on Legal Problems on International Organization for Maintenance of Peace, of which Chief Justice Wendell P. Farris, of Vancouver, B. C., was the temporary and acting chairman, the Canadian Bar Association at its meeting in Montreal at the end of August adopted the following:

> WHEREAS, the United Nations Commission on Human Rights, meeting in Geneva, Switzerland, on December 17, 1947, presented for the consideration of the members of the United Nations a draft international Declaration and Covenant on Human Rights, and
>
> WHEREAS, a Committee of the Senate and House of Commons held sittings in respect thereto, during the recent session of the Parliament of Canada, and
>
> WHEREAS, it is expected that an amended draft Declaration, now being examined by the Economic and Social Council of the United Nations, will be considered by the General Assembly of the United Nations meeting in Paris, France, in September, 1948, and
>
> WHEREAS, any such Declaration would if adopted constitute a guide to the international law of the future:
>
> BE IT RESOLVED, That The Canadian Bar Association goes on record to the effect that the said draft Declaration ought to be examined with the utmost care in all its juridical aspects before further action is taken, so that there may be no misunderstanding as to the meaning and effect thereof; and
>
> BE IT FURTHER RESOLVED, That this Committee be continued and that it make careful study of all the implications that might be involved in the adoption of a draft international declaration (and/or covenant) on human rights and that it work to that end in close collaboration with the corresponding Committee of the American Bar Association and the Canadian Department of External Affairs.

Chairman of the Canadian Committee is John Hackett, M.P., of Montreal, who recently finished his term as President of the Canadian Bar Association. Its members include Chief Justice Farris, of British Columbia, who as Chairman in 1944-45 worked so closely with our Association's Committee as to the World Court and the Statute of the Court; Chief Justice J. C. McRuer, of Ontario, who addressed the 1947 meeting of our Association as President of the Canadian Bar Association; Chief Justice E. K. Williams, of Manitoba, who was President of the Canadian Bar Association in 1946 and addressed our Atlantic City meeting; and Dean George Curtis, of the Law School of the University of British Columbia.

Chairman Hackett and Messrs. Farris and Curtis of his Committee came to Seattle and conferred at length with President Holman and members of our Association's Committee as to organization and plans for joint work. It is expected that these can be completed for announcement in the November issue of the JOURNAL.

Other Matters Reported On by the Committee

In conclusion, the report of our Association's Committee informed the House of Delegates:

> Your Committee has not in any respect changed its opinion that our Association should continue its active support of the principle and practice of international association, organization, and cooperation, and its united, undivided support of the United Nations and the principle of international law and adjudication represented by the International Court of Justice and by the Statute of the Court. We see no occasion at this time for asking the House of Delegates to declare again the attitude which has been repeatedly voted and made manifest on the subject.
>
> In respect of "the progresssive development of international law, and its codification", we report to the House that the General Assembly will, at its 1948 regular meeting which opens on September 26, elect the members of the International Law Commission which will undertake the great task that was entrusted to it by the action of the General Assembly. We note with pleasure that the government of the United States has selected as its nominee for membership in the new

1. For a discussion of this subject by the Chairman of the Association's Committee as of March 22, 1948, see: "International Legislation and the American System", Vol. XXII, *Tulane Law Review*, pages 547-557 (June, 1948).

Commission Professor Manley O. Hudson, whose services to international law and assistance to the work of our Association in that field have been manifold. The authorization which the House of Delegates has previously voted for the cooperation of our Association with the International Law Commission, and for working with the Canadian Bar Association in that project, continues in force; and we are hopeful that ways and means will be found whereby our Association may be in a position to resume its active work in that field, by the time the members of the International Law Commission have been elected and that body has been organized to begin its work.

Lawyers on Postage Stamps:

Some Research in Philatelic and Legal History

by **Albert P. Blaustein** • of the New York Bar

■ The young author of the diverting legal whimsey in our June issue ("Sherlock Holmes: Was Conan Doyle's Famed Detective a Lawyer?") has turned his facile pen to the field of philately and has brought together interesting data as to the extent to which American judges and lawyers have been accorded recognition through portraiture on postage stamps—perhaps a symbol of enduring fame. The list is impressive, and the article is given timeliness by the recent issue and present currency of the three-cent stamp in honor of Chief Justice Harlan Fiske Stone. Mr. Blaustein has previously contributed philatelic articles to *Scott's Monthly Journal*, published by the Scott Stamp and Coin Company.

It is, of course, a matter of common knowledge that philately, or stamp collecting, is extensive not only in this country, but throughout the world and that many hundreds of thousands of dollars are invested in stamps, the value of which lies not in their beauty or design, but in their rarity.

■ So spoke Mr. Justice Curtis from the bench of the Supreme Court of California in 1935, in deciding the case of the *American Philatelic Society* v. *Claibourne*, 3 Cal. (2d) 698, 46 Pac. (2d) 135. But to the lawyer-philatelist, especially if he be of the American variety, neither the element of "rarity" nor the intricacies of the "postage-stamp cases" will suffice for the proper pursuit of his hobby. This year, as the Post Office Department prepares to break all philatelic records (more than thirty separate stamp issues are contemplated), there has been a revival of interest in the attorneys who have been honored by the art of the postage-stamp engraver.

Much of this interest has stemmed from the issuance of the Harlan Fiske Stone "commemorative"—an attractive three-cent purple stamp which was placed on first-day sale on August 25 at Chesterfield, New Hampshire. An initial printing of 50,000,000 stamps was ordered. The late Chief Justice thus becomes the 144th man whose portrait has appeared on an American stamp in the 101 years of our philatelic history; he is the third Chief Justice, the fourth Supreme Court appointee, the ninth jurist, the forty-first practicing attorney, and the forty-eighth legal scholar, to receive this honorable recognition.

Supreme Court Justices Who Have Been Portrayed on Stamps

Heading the list of lawyers whose portraits have been on our stamps is Chief Justice John Marshall, who appeared on the five-dollar issues of 1895 and 1903, and Chief Justice William Howard Taft, who became a philatelic personality on the four-cent stamp of 1930 and the fifty-cent stamp of 1938. The only other Supreme Court appointee to achieve this distinction was Edwin M. Stanton, Lincoln's Secretary of War, who was pictured on the seven-cent stamps of 1871 and 1875. Stanton never served on the Court, as death intervened before he could take his seat.

While Marshall and Stone achieved their greatest eminence in the law and adjudication, their fellow postage-stamp jurists attained greater fame in other fields of endeavor. Among them two Presidents (in ad-

dition to Taft, once an Ohio Circuit Court Judge) had graced the benches of their States: Andrew Jackson served with distinction on the Supreme Court of Tennessee, and Martin Van Buren became an important political figure via the post of Surrogate in New York. The other judicial figures in philately have been Stephen F. Austin, an Arkansas judge, famed as the founder of Texas; Robert R. Livingston, Chancellor of New York, who negotiated the Louisiana Purchase; and Revolutionary War General John Sullivan, who was a United States Judge in New Hampshire.

Portraits of Lawyer-Presidents on Stamp Issues

The first of the lawyer Presidents to make an appearance on United States postage was Thomas Jefferson, who was pictured for the first of many times on the five-cent stamp of 1856. Since that time every President with the exception of Herbert Hoover and Harry S. Truman has been honored by the postal authorities. (Living persons are not pictured on American stamps.) And of the thirty former Presidents portrayed in our philately, all but five were disciples of Blackstone. These non-lawyers were George Washington (who nevertheless served some seven years as a judge), William Henry Harrison, Zachary Taylor, Andrew Johnson and Ulysses S. Grant. Presidents Theodore Roosevelt and Warren G. Harding failed to follow up their legal studies by active practice at the Bar.

Although four of the five non-lawyers among the chief magistrates gained their acclaim on the field of battle before assuming the presidency, the "lawyers" on the Army General Staff have not been denied philatelic recognition. Jackson and Sullivan were judges; Sam Houston, commander of the armies of Texas, was once a district attorney in Nashville, Tennessee; Winfield Scott alternately gave up the Army for the law and the law for the Army; and William Tecumseh Sherman, who studied law as a soldier, eventually took up private practice in Leavenworth, Kansas, where he is reported to have lost the only case he ever brought to Court.

Outstanding Lawyers Who Have Been Given Philatelic Recognition

Most of the lawyers who have attained recognition on our postage were outstanding members of the Bar. Alexander Hamilton was easily the foremost attorney in New York at the time of the Revolution. Henry Clay, for many years the leading attorney of Kentucky and a leader of the Bar of the nation was a specialist in the criminal law and boasted that none of his many clients was ever hanged. One of the most feared and respected lawyers in the history of the Bar of the Supreme Court was Daniel Webster, who had been recognized previously as the leader of the New Hampshire and Massachusetts Bars. And William H. Seward, sometime Governor, Senator, and Lincoln's Secretary of State, was the acknowledged leader of the Bar of New York in the pre-Civil War period.

Other practicing attorneys whose portraits have appeared on stamps are Washington Irving, the author, who was a member of the New York Bar; Francis Scott Key, fellow-student and brother-in-law of Chief Justice Roger B. Taney, who was United States Attorney for the District of Columbia; James Russell Lowell, a graduate of the Harvard Law School, who was an advocate before becoming a poet, editor and educator; Horace Mann, who practiced for fourteen years before turning to the field of education; and Joseph Pulitzer, the editor and publisher, for many years an active member of both the New York and District of Columbia Bars.

Five students of the law, in addition to Presidents Harding and Theodore Roosevelt, failed to practice but nevertheless were acclaimed on our stamps. This group includes the only woman lawyer of philately—the suffrage reformer Carrie Chapman Catt, who took a special course in law at the State College of Iowa shortly after the Civil War. The others were William Penn, who attended Lincoln's Inn in order to learn enough law for his business activities; Manasseh Cutler, who gave up the law to become a clergyman and colonizer; Roger Williams, a former student of Lord Coke; and Eli Whitney, whose invention of the cotton gin interrupted a legal education which was never to be completed.

9

Dissension in the Court:

Stare Decisis or "Flexible Logic"?

by **Ben W. Palmer** • of the Minnesota Bar (Minneapolis)

■ In his present contribution, Mr. Palmer delves deeply into the nature of the judicial process and the function of the highest Court in a federal republic under a written Constitution which sets metes and bounds for government and vouchsafes historic rights to persons and to States through placing limitations on the powers of governments. This inquiry brings him face-to-face with the "discordant and unsettling" effects of the increasing disregard of the doctrine of *stare decisis* and the substitution for it of what seems to be a resort to the pragmatist's "flexible logic" which, instead of working syllogistically from accepted principles and premises to a consistent judgment, starts with an anticipated conclusion and proceeds backwards to find and state "principles" or judicial techniques which will permit or support the desired social or economic change. Mr. Palmer's analysis seems to suggest that this unsettling and divisive method is a logical concomitant of undertaking legislation and "reform" in the guise of judicial decisions. In any event, Mr. Palmer finds in this fundamental conflict between *stare decisis* and "flexible logic" one of the major causes of dissents and dissensions in the great Court; he foresees a further increase of such schisms if false philosophy of the judicial process "infects" further the members of the Court.

Mr. Palmer's fourth contribution is submitted in the equable spirit, and for the high purposes, expressed in our editorial written when he began his series ("Discussing Decisions of the Supreme Court", 34 A.B.A.J. 584; July, 1948). An editorial in this issue comments on the present article.

■ A cause of dissension and dissent in the Supreme Court is differences among the members of the Court as to the value and weight of the once-honored rule of *stare decisis* generally, and particularly as to whether it should be relaxed or disregarded in a particular case or class of cases.

Arguments for letting the rule of law and prior decisions stand are its great role in the development of the common law, its avoidance of re-argument and relitigation of the same question, its limitation on the discretion of the individual judge so as to make the law more impersonal, its tendency to make the law more certain and predictable and dependable as a guide for advice and action. It may also lead judges to greater care in making a decision since they are thereby creating precedents.[1]

Arguments against giving effect to *stare decisis* are that certainty in the law has become an illusion, that predictability is overvalued since men generally act first and look up the law afterwards, that the judicial function is largely legislative and there is no more reason for the judge as legislator to be bound by his predecessors than if he were formally possessed of legislative power, that *stare decisis* perpetuates error, prevents Courts from adapting the law to the changed needs and desires of society, that it is an abdication of the reasoning power, judgment and responsibility of the present generation of judges. Furthermore, it is argued that rigid adherence to *stare decisis* would prevent the growth of the common law which has been its glory, would be inconsistent with the constant re-examination of precedents, with the maxim that where the reason ceases the rule ceases, and with Blackstone's statement that previous cases are not to be followed if "flatly absurd or unjust".[2]

We suppose that most men

1. Theodore F. T. Plucknett, *A Concise History of the Common Law*, page 303. Cardozo, *Nature of the Judicial Process*, page 149. Hamilton, No. 78 of *The Federalist*, Blackstone, *Commentaries on the Laws of England*, (3rd ed., Cooley, 1884), Volume I, page 70 (introduction to Lecture 3).

2. Quoted in Max Radin, *Handbook of Anglo-American Legal History*, pages 355-356. Bracton stood for *stare decisis* as early as the thirteenth century: Miriam Theresa Rooney, *Law, Lawlessness and Sanction*, page 79. See also, *Selected Essays on Constitutional Law*, Volume II, pages 398-399; 24 *Texas L. Rev.* 190; 40 *Ill. L. Rev.* 303; 31 A.B.A.J. 501, October, 1945; Jackson in 19 *Conn. Bar Jour.*, January, 1945; 14 *Jour. Bar Assn. Kan.* 65; 59 *Harv. L. Rev.* 376; 31 *Mass. L. Quar.* 43; 3 *Mich. L. Rev.* 89; 9 *Harv. L. Rev.* 27; 9 *Modern Legal Philosophy Series* XXVI; 1913 *Col. L. Rev.* 441; 14 A.B.A.J. 71, 159, February, March, 1928; 8 *Col. L. Rev.* 605, 614; 23 *Col. L. Rev.* 319; 29 *Ill. L. Rev.* 971; 37 *Harv. L. Rev.* 409; 21 *Texas L. Rev.* 514; 79 *U. Pa. L. Rev.* 833; Jackson in 30 A.B.A.J., 334, June, 1944; 44 *Mich. L. Rev.* 955; Reed in *Pa. Bar Assn.*, No. 35, pages 131-150, Ap. 1938; *Hertz v. Woodman*, (1910) 218 U. S. 205, 212; 30 S. Ct. 621.

For material on the decline of *stare decisis* since

would agree with Justice Clarke that the "dead hand of the common law" should not always govern;[3] with Holmes that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV";[4] with Cardozo that "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function they are diseased. If they are diseased they must not propagate their kind."[5] So Brandeis said: "It is a peculiar virtue of our system of law . . . that an expression in an opinion yields later to the impact of facts unseen."[6] But note Cardozo's addition:[7]

> The impact may come from a new fact. It may come from a changing estimate of policy or justice, which is to say the same thing in other words, since the current thought as to such matters is as much a fact as any other. What was ruled or next to ruled was well enough often according to the wisdom of its day. The light of a new day has set it forth as folly.

In cases involving the law of the Constitution, the Court has long given less adherence to *stare decisis* than in cases involving only private rights, on the ground that except for a constitutional amendment to overcome a decision, only the Court itself can correct an error once made by it—Congress is impotent. Said Brandeis:[8]

> In cases involving the federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful in the physical sciences is appropriate also to the judicial function.

Judges' Views of Complex Social and Economic Data

Convictions for or against maintaining the *status quo* affect decision for or against *stare decisis* in a given case. Witness the use of the doctrine by Justices Butler and Sutherland as a weapon against laws that would change the established order.[9] But the judge's view of social and economic facts is of the greatest importance.[10] The abandonment of *laissez faire* and the attempted legal control of a complicated, modern, urban society have made constantly necessary judicial appraisal of the complex institutions, practices and forces which move that society.

Contrast a random volume of the Supreme Court Reports of a century ago with one of today's volumes. In the former are few cases of public or constitutional law. Many turn upon a narrow rule of the common law or the construction of a specific statute such as the statute of frauds. Factually, the Justices look through the eye-piece of a microscope at a small and confined area of fact—of fact concrete in character: Whether a certain tort or marriage took place, or whether the essentials of adverse possession were proved. In case after case today, on the contrary, Justices sweep their individual telescopes to the remotest boundaries of the land and even across the seas. Especially in the era that has followed resort to the "Brandeis brief", they attempt to see, for example, all the facts entering the problem of multiple taxation

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the beginning of the century, especially in the last ten years in the Supreme Court, see Aumann, *Changing American Legal System*, pages 212, 221; Corwin, *Twilight of the Supreme Court*, page 120; 31 A.B.A.J. 113, March, 1945; Swisher, *Field*, page 81; Holmes, *The Common Law*, page 89.

Arthur L. Goodhart in *Essays in Jurisprudence and the Common Law* (1931), page 65 expressed the opinion that the trend away from *stare decisis* in the United States is not temporary but permanent and that "in no distant time the American doctrine will approximate the civil law".

For arguments against *stare decisis*, see Warren, *Supreme Court in U. S. History*, Volume III, page 471; *Borden v. N. P. R. Co.*, 154 U. S. 288; Daniel, J. dissenting in *Steamer Oregon v. Rocce*, (1855) 59 U. S. (18 Howard) 570, 575; Frank, *Law and the Modern Mind*, reviewed in 25 *Am. Pol. Sci. Rev.* 749; Cohen, *Law and the Social Order*, page 358; Adler in 31 *Col. L. Rev.* 91; 4 *Modern L. Rev.* 183; 51 *Yale L. Jour.* 1269; 36 *Ill. L. Rev.* 239; Pound in 13 *Col. L. Rev.* 697; Holmes in 10 *Harv. L. Rev.* 466; Cardozo, *Nature of the Judicial Process*, page 166; dissent in *Railroad Commission v. Pacific Gas & Electric Co.*, (1938) 302 U. S. 388, 418; 58 S. Ct. 334, 349; editorial in the *Saturday Evening Post*, January 25, 1947; 31 *Col. L. Rev.* 91; 49 *Harv. L. Rev.* 44.

3. *Rosen v. U. S.*, (1918) 245 U. S. 465, 471; 38 S. Ct. 148, 150. President Wilson in 39 A.B.A. Rep. 7 (1914) and Hampton L. Carson's comments at page 113. See also 37 A.B.A. Rep. 386 (1912).

4. 10 *Harv. L. Rev.* 469 (1897). In 1873 he wrote of precedents: "We believe the weight attached to them is about the best thing in our whole system of law", 7 *Am. L. Rev.* 579.

5. Cardozo, *Nature of the Judicial Process*, pages 90, 112, 149-150; Brandeis, J. dissenting in *Washington v. Dawson & Co.*, (1924) 264 U. S. 219, 44 S. Ct. 302, 68 L. ed. 646. See 49 *Harv. L. Rev.* 104.

6. Brandeis, J. dissenting in *Jaybird Mining Co. v. Weir*, (1926) 271 U. S. 609.

7. Cardozo, *Paradoxes of Legal Science*, page 63, *Nature of the Judicial Process*, page 150.

8. *Chisholm v. Georgia*, (1793) 2 Dallas 419, 1 L. ed. 440, overruled by the Eleventh Amendment and *Pollock v. Farmers Loan & Trust Co.*, (1895) 158 U. S. 601, 15 S. Ct, 912; 39 L. ed. 1109, overruled by the Sixteenth Amendment. See Stone in 50 *Harv. L. Rev.* 24; Brandeis, J. dissenting in *Burnet v. Coronado Oil & Gas Co.*, (1932) 285 U. S. 393, 405, 52 S. Ct. 443, 76 L. ed. 815; quoted in *New York v. U. S.*, (1946) 66 S. Ct. 310, 318. See, also, 46 *Harv. L. Rev.* 361, 593, 795; 29 *Harv. L. Rev.* 683; Reed in *Pa. Bar Assn. Quar.* (1938) 131; Daniel, J. dissenting in *Rundle v. Delaware & Raritan Canal Co.*, (1852) 55 U. S. (14 Howard) 77, 99.

A revolutionary extension of federal jurisdiction resulted from reversal of *The Steamboat Thomas Jefferson*, (1825) 10 Wheaton 428, by *Propellor Genessee Chief v. Fitzhugh*, (1852) 12 Howard 443, 13 L. ed. 1058 (see Warren, *Supreme Court in U. S. History*, Volume II, page 515). Compare Taney's words in *Genesse* about changed conditions, with *West Coast Hotel Co. v. Parrish*, (1937) 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703, which speaks of "economic conditions which supervened" after the *Adkins* decision.

9. Frankfurter puts it that it is a matter of "policy". See *Helvering v. Hallock*, (1940) 309 U. S. 106, 119; 60 S. Ct. 444, 451. Stone, J. dissenting in *Burnet v. Coronado Oil & Gas Co.*, (1932) 285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815, because he would overrule *Gillespie v. Oklahoma*, (1922) 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338. In the *Southeastern Underwriters* case he voted emphatically for *stare decisis*.

10. Cardozo, *Paradoxes of Legal Science*, page 63, 42 *Harv. L. Rev.* 18; 29 *Harv. L. Rev.* 364; 31 *Col. L. Rev.* 390, 410.

11. For example: *Curry v. McCanless*, (1939) 307 U. S. 357, 59 S. Ct. 900; *State Tax Commission v. Aldrich*, (1942) 316 U. S. 174, 62 S. Ct. 1008 (multiple taxation); *Nelson v. Sears, Roebuck & Co.*, (1941) 312 U. S. 359, 61 S. Ct. 586 (burden on commerce); *Helvering v. Griffeths*, (1943) 318 U. S. 371, 63 S. Ct. 636 (taxation); *Eastern-Central Motor Carriers Assn. v. U. S.*, (1944) 321 U. S. 194, 64 S. Ct. 499 (competition between rail and motor carriers); *Federal Power Commission v. Hope Natural Gas Co.*, (1944) 320 U. S. 591, 64 S. Ct. 281 ("prudent investment" theory and utility valuations); *U. S. v. Ballard*, (1944) 322 U. S. 78, 94, 64 S. Ct. 882, 889 (citing William James' *Varieties of Religious Experience*); *Jones v. City of Opelika*, (1942) 316 U. S. 584, 610, 62 S. Ct. 1231, 1245 (histories); *U. S. v. S. E. Underwriters Ass'n.*, (1944) 322 U. S. 533; 64 S. Ct. 1162 (insurance; congressional debates); *N. W. Airlines v. Minn.*, (1944) 322 U. S. 292; 64 S. Ct. 950 (multiple taxation); *Wallace Corp. v. N.L.R.B.*, (1944) 323 U. S. 248; 65 S. Ct. 258 (labor relations); *Southern Pacific Co. v. Arizona*, (1945) 325 U. S. 761, 65 S. Ct. 1515 (effect of long trains); *Allen Bradley Co. v. Local Union No. 3*, (1945) 325 U. S. 797, 65 S. Ct. 1533 (labor unions and monopoly); *Ribnik v. McBride*, (1928) 277 U. S. 350 (facts about private employment agencies); *1st Dearborn Dist. Co. v. Seagram Distillers Corp.*, (1936) 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (resale price control); *Indian Motorcycle Co. v. U. S.*, (1931) 283 U. S. 570 (shifting of taxation); *Helvering v. Davis*, (1937) 301 U. S. 619, 57 S. Ct. 904 81 L. ed. 1307, 109 A.L.R. 1319 (old age statistics); *Nebbia v. New York*, (1934) 291 U. S. 502, 516, 54 S. Ct. 505, 78 L. ed. 940, 89 A.L.R. 1469 (marketing conditions in milk shed area).

See, also, 38 *Harv. L. Rev.* 6; 3 *Ore. L. Rev.* 195; 36 *Col. L. Rev.* 283; 46 *Col. L. Rev.* 853; 30 *Col. L. Rev.* 360; Rodney L. Mott, *Due Process of Law*, pages 539, 540, 551, 577; 12 *Am. Pol. Sci. Rev.* 241; 44 *Harv. L. Rev.* 33; Holmes in 20 *Am. L. Rev.* 741; Cardozo, *Growth of the Law*, page 117; 45 *Harv. L. Rev.* 302; 17 *So. Calif. L. Rev.* 335.

of intangibles,[11] the competition of States and nation for supporting revenues, the incidence and shifting of taxation, the effect of taxes on business and the distribution and inheritance of wealth, the effect upon the failure or success of different types of enterprise, competing geographical areas, and conflicting pressure groups. They consider facts with relation to price controls, monopoly, unfair trade practices, burdens on commerce, labor organizations in conflict with each other and with management and against the unorganized public. They appraise the "reasonableness" of constantly new types of legal controls applied to constantly new or changing complex conditions.

"Authorities" Now Include Great Masses of Chaotic Material

Not only are the facts infinitely more complex, elusive, and intangible, but as a result of the impact of the newer social sciences upon analytical jurisprudence, Justices go out to meet the facts.[12] "Authorities" now go far beyond the books of the law: Reports by all sorts of investigating bodies, private and public; utterances of economists, historians, sociologists, psychologists, criminologists, bankers, industrial and labor leaders; legislative debates and reports; speeches; the resolutions of pressure groups; studies of the cost of living, studies of markets, agriculture, medical care, depressions, unemployment, old age, the effect of work on women and children. Here is brought to the bench not only fact but much theory and opinion—a babel of conflicting tongues with no single authoritative voice, and the truth hard to find.

No Justice can read all of the vast mass of chaotic material; even if he had a photographic mind he would have to interpret the photograph. There must be selection and appraisal. And the "sovereign prerogative of choice" is necessarily affected by his particular competence or lack of it in dealing with the various materials of study, his training and experience in a given field of study, his social, political, psychological, philosophical and economic environment.[13]

Other Divergent Elements in the "Judicial Process" as Now Conceived

Furthermore, even if two or more Justices agree in their choice and evaluation of facts, there are other ingredients in the judicial brew: "Logic, and history, and custom and utility, and the accepted standards of right conduct . . . inherited instincts, traditional beliefs, acquired convictions".[14] One judge is historically-minded and he puts in more history; another is more inclined to live in the present or shape the law for the future as he envisions it. To one, the old comes with the prestige of the accumulated wisdom of the race; to another, the new has presumption of superiority over the old. One tends toward formalism, legal symmetry, excessive care that the particular brick fitted by him into the house of the law spoil not the harmonies created by successive generations of lawyers and judges, famous and unsung. Another feels the urge toward individual, isolated craftsmanship without regard to the handiwork of others, oblivious of any discordant shape or color. Furthermore, it makes a tremendous difference whether a judge is inclined to move by processes of logic from what he regards as first principles to an end he cannot foresee and does not consciously desire, or whether he moves backwards from a desired result to an authoritative or outwardly logical justification. Here it is that differences in the use or non-use of the pragmatic approach often accounts for dissensions in the Court. John Dewey, apostle of pragmatism, drew the distinction in 1924:[15]

> What Justice Holmes terms logic is formal consistency, consistency of concepts with one another irrespective of the consequences of their application to concrete matters of fact. . . . There are different logics in use. One of these, the one which has had greatest historic currency and exercised greatest influence on legal doctrine, is that of the syllogism. To this logic the strictures of Justice Holmes apply in full force. For it purports to be a logic of rigid demonstration, not of search and discovery. It claims to be a logic of fixed forms, rather than of methods of reaching intelligent decisions in concrete situations, or of methods employed in adjusting disputed issues in behalf of the public, and enduring interest. . . . It implies that for every possible case which may arise, there is a fixed antecedent rule already at hand.

Dewey then said that "as a matter of fact, men do not begin thinking with premises", that they generally begin with some vague anticipation of a conclusion and then work backwards. He then proceeded to argue for a kind of logic which he predicted, and rightly, would have "revolutionary" implications. There must be, he said, "a logic relative to consequences rather than antecedants", a logic which would use general principles only to the extent of the work they might do in the process of inquiry into probable consequences. Even these, "like other tools . . . must be modified when they are applied to new conditions and new results have to be achieved".

"Infiltration" of "Flexible Logic" To Justify Revolutionary Changes

Then that master pragmatist launched his attack upon the old formal or syllogistic logic:[16]

> Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practice constantly widens the gap between current social conditions and the principles used by the Courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests. . . . The sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular. If this be so, infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.

The infiltration came, and with it

12. *Muller* v. *Oregon*, (1908) 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551. For list of Brandeis' briefs, see Josephine Goldmark, *Introduction to Case Against Nightwork for Women*, National Consumers League (1918), page A3. See, also, Frankfurter, *Mr. Justice Brandeis, page 52; 29 Harv. L. Rev. 364; 45 Harv. L. Rev. 77.*

13. Cardozo, *Nature of the Judicial Process*, page 175.

14. Cardozo, *op. cit.*, pages 10, 12, 112. See 50 *Harv. L. Rev.* 390; 36 *Harv. L. Rev.* 1046.

15. John Dewey in 10 *Cornell L. Quar.* 17.

16. This tied in with the criticism of the Court by "Progressives" in the Theodore Roosevelt era.

came the "flexible logic" as an instrument of that "liberalism" which grew out of the progressive movement first dramatized by Theodore Roosevelt in 1912. And John Dewey's conquest by "infiltration" became easier because his attack upon formal logic coincided with an anti-intellectual wave of post-World-War-I disillusionment, skepticism, cynicism, Freudian and behavioristic psychology which decried or denied the rationality of man and made him the rationalizing victim of his own illusions. The effect was what Newman might well have called "poisoning the wells of controversy".

Every man's parade of logic as appeal to basic principles is made to appear as consciously or unconsciously a sham and pretense. And if an opponent happens to be your associate on the bench and you are uncontaminated by his point of view, how can you arrive at agreement if you doubt his sincerity, his rationality, and also your own?

The Discordant Results of Judicial Adoption of "Flexible Logic"

Note, too, the unsettling and discordant results of the adoption of a "flexible logic", a logic consciously bent to serve and secure the ends you desire, whether they be "liberal" or "conservative"—promotive of one preconceived social and economic order or another. What hope for harmony of judicial thought and conclusion can there be if "general principles" are to be "modified" when "new results have to be achieved"—that is to say, when new results are desired by you or the class you represent? Instead of probing for truly basic principles of truth, instead of trying by free discussion to arrive at agreement on major premises, may not everything be reduced to a struggle of *desires* in which "principles" are merely *weapons*?

Certainly under the old processes of formal logic, once there was an agreement on a major premise, there was a much narrower and straighter and less debatable path to a common destination than when the "principles" are deliberately chosen to further desired ends and the logic is the "flexible logic" which reduces everything to a struggle of competing, often selfish, interests.

Justices Regarded as Champions of Particular Philosophies

Will not, and do not, those who have adopted this philosophy and approved this technique "logically" look upon the Justices of the Supreme Court of the United States merely as champions of given social, political, and economic points of view, or of certain class, religious or racial groups, of definite organizations of special interest, either of capital or of labor? Is it strange that in certain publications the Court is represented, not as an assembly of law-governed confreres objectively and conscientiously engaged in the pursuit of truth as to mandates of the Constitution, but rather as a cockpit of fighting Justices?

Would it be strange if some of the Justices, infected by the circumambient popular and pseudo-scientific view, should, not crudely but with discreet and genteel finesse, regard themselves as to some extent champions? And if Justices were to regard their function as largely legislative in character and the Court as a policy-making body, adopting policies not based upon common agreement as to basic principles but upon the prevalence of one group or faction over another in the Court, what hope could there be for stability or harmony of decision?

If the Court Legislates, Is It Bound by Precedents?

The legislator is not bound by the judgment or the law-making of his predecessors. Why should the Court be *if it legislates*? Suppose further that judges generally were to view judging as merely administration? Then indeed they might adopt the saying: "Judging is not a matter of paste and pot and scissors, of assembling what was said by them of old-time, of keeping life in, or of raising from the dead, the bodies of old cases, no matter how lovely and appealing they once were." Will they not appeal to Justice Holmes' saying that "general propositions do not decide concrete cases" as justification for the decision of cases by the casting of dice or by the "hunch" or "judgment intuitive".[17]

And if such an attitude toward the judicial process infects, however subtly or unaware, the mental processes of members of the Supreme Court, then indeed will there be even greater dissension than in recent years. And *stare decisis* will be buried deep, with only faint vestigial remnants in the law books of the future, and a *hic jacet* to catch the eye of the curious antiquarian of the coming day.[18]

17. Joseph C. Hutcheson, Jr., 23 *Jour. Am. Jud. Soc.* (1939); 14 *Cornell L. Quar.* 274; 11 *Am. L. Sch. Rev.* (1934) 1071; 27 *Ill. L. Rev.* 357; 7 *Tulane L. Rev.* 1. For his complaint about uncertainty, see *Addison v. Commercial National Bank*, (1948) 165 F. (2nd) 937.

18. See note 2, *supra*, on the decline of *stare decisis*.

10

Challenge to the Lawyer-Citizen:

All Should Enroll and Work in Party Organizations

by **Roscoe P. Thoma** • of the Iowa Bar (Fairfield)

■ As President of the Iowa State Bar Association, Mr. Thoma delivered an address at its 1948 meeting which contains a trenchant and timely message for all lawyers in America. Depicting first the ascendancy of state socialism and collectivism in Europe, even in Britain, and the efforts and trends in that direction in our country, he appealed for resistance by an aroused public conscience under the leadership of lawyers and for the translating of that spirit into practical action by all citizens through their taking part in all "processes of government", including the work of party organizations and the outcome of primaries and elections.

Many members of the Bar are of course engaged largely or primarily in political activity and the holding of public office; but the active practitioners and the well-trained lawyers of fine professional spirit too often hold aloof. Emphasizing that our federal republic is based on government through political parties, he urged that all lawyers should fulfill their duty of active participation in the determination of party policies and the nomination and election of party candidates. He looked on this as the only way to assure the preserving of our free institutions and particularly the American system of individual opportunity through free private enterprise. We publish the address in full because we believe it reflects significantly the spirit which is becoming manifest in many State and local Bar Associations—"let's do something about it".

■ The entire world and its respective peoples and governments currently present a quite uniform picture of more disturbance, more instability, and more uncertainty for the future, than at any other so-called peace era of all time.

Historically unsound theories of government presented by vagrant philosophies, state socialism promotions and Communistic evangelism, with their apparently easy appeal to the hungry, the exhausted, the groping, the uninformed, the discontented, are urged upon all peoples of the world—even our own. Efforts of such groups have gained enough converts in certain areas to enable the conversion of governments in whole or in part to these systems so abhorrent to those who understandingly believe in the fundamentals of the American system. The same forces are making substantial progress in other portions of the globe. They even threaten us here.

Law as history presents it has left the world. The Decalogue is discarded. The great civil law of the European Continent met practical abandonment during the late world conflict. The great principles of the common law have been badly battered. Authoritarian government—the right to rule, to declare, direct, promulgate and determine solely by reason of office—seeks to dominate in every nation. The fundamental principles of sound thinking and conduct accumulated through the ages are in disrepute. Constitutional representative government providing for authority under law and not by men has too few admirers and champions in the present-day world. It falters in our own land.

Opinions and decisions, unseasoned by the lessons of the world's history, little based on the known and recognized fundamentals either in government or economics, and lacking sound thinking, predominate in the dictated thought and action of current-day rulers.

The great sciences march on and present us with marvelous elements and devices for relief from physical and mental pain and suffering, and for mass production of things for man's use and enjoyment. But, at the same time, all of this scientific effort under sponsorship by the rulers of the world powers brings us great machines and plans for the destruction of all creation in another final world conflict.

Peoples of the World Want Peace and Liberty Under Law

The peoples of the world—the men, women and children—in the mass—want peace. They want an orderly existence, freedom of work, freedom of thought, freedom of competition, personal liberty, freedom from interference by government, and a right to accrue for themselves the fruits of

their own efforts. This is the true American theory. These are the fundamental ideas that guided our forefathers in establishing the American system. They knew that only the rulers make war and break the peace. They knew that only the rulers prevent those desired objectives of the people and bar their realization.

To have peaceful relationships, both internal and foreign, to establish and maintain a satisfactory economic structure, governments must be sound and stable, fully reflecting these objectives of the people. To fulfill *this* nation's proper function in the world establishment, the United States must exemplify the most sound, most stable, most beneficial government to its own people and attain a purpose of unselfish aid, help and assistance to the peoples of other nations.

Our Structure of Government Depends on Participation

What may be said of our own structure?

Less than 160 years ago this nation set sail under a Constitution. This fundamental covenant provided for a representative system—not for a democracy. It declared for a government under law—not by men. Its objective was to assure personal liberty, freedom of thought and action, protection against oppressions—and private free enterprise.

Such a plan encouraged that freedom of thought which incites and leads to inquiry, to discussion and debate with reason, to expression without violence, and for arrival at the most agreed upon solution by duly constituted representatives through appropriate action all under certain processes open to equal participation by all citizens. The respective State structures have followed the same plan and utilize like processes for action in each political unit. This constitutes the representative system.

These "processes of government" in which the citizen participates include all formal elections, from the smallest political unit to those affecting the national structure. In these, both privilege and duty rest with the electors. If not exercised, a true expression is not recorded and the purpose of the effort has not been truly attained. To absenteeism at the polls may be charged failure of election of true representatives of sound theories of government and the establishment in places of authority of those who flirt with, and often accept in whole or in part, alien philosophies so contrary to the American theory, and which in course effect restrictions on our freedom of thought and action and curb and stifle free private enterprise.

The establishment of an incorrect trend in such a direction gathers force speedily and induces government gradually to establish restrictions on liberty and freedom, take on additional autocratic authority, and become the director and controller of all effort, enterprise and economy in the flagrant claim and guise of benefits to "the people"—and which progressive development of restrictions and power leads directly and definitely to state socialism.

The Rise of State Socialism Has Taken Place in Europe

Does it happen? It has happened. Observe the nations of continental Europe that have fallen under the spell of such action. Witness Britain—heretofore the greatest world power, a monarchy but boasting with pride the claimed best elective parliamentary system in the world—as an aftermath of the world conflict pitching itself into the throes of state socialism, gradually converting the industrial enterprise of the realm to the socialist status. And right now we find the leaders of the party there currently in authority boldly criticizing our failure to have caught up with them in this movement. Let us add: This finds echo in certain quarters of our own land.

ROSCOE P. THOMA

Shall we follow? What is to prevent it? But one thing can balk this trend in America.

Only An Aroused Public Conscience Can Balk the Trend to Socialism Here

That thing is an aroused public conscience led and participated in by all of the intelligent, sound thinking believers in freedom of thought and action, freedom of competition, freedom to work, freedom to accrue for ourselves the fruits of our own effort, freedom of private enterprise—enlightened private capitalism—and not state socialism.

Concerning the Author: Roscoe P. Thoma was born in Fairfield, Iowa, in 1885, and was graduated from the State University of Iowa in 1907 and the Harvard Law School in 1910. He was admitted to the Iowa Bar in that year, and has ever since been a member of the firm of Thoma and Thoma, in Fairfield, in general practice of law. In 1940 he was a Special Assistant Attorney-General of his State; in 1941-42, a member of the Iowa Supreme Court's Advisory Committee for the Preparation of New Rules of Civil Procedure. He was a delegate to the Republican National Convention in 1940 and an Assistant to the Chairman of the Republican National Committee at the 1944 Convention. He is a trustee of Parsons College, in his native city. He has been a member of our Association since 1945, and is a member also of the Jefferson County Bar Association, the Second Judicial District Bar Association, and the Iowa State Bar Association.

That belief, effort and movement must be translated into action at the polls in every election from the smallest local unit to the national level, by the selection for public place of the kind of representatives for public service that completely and abidingly believe in such principles and fundamental rights and who cannot and will not be diverted to the methods, plans and objectives of these alien philosophies now so rampant throughout the world.

Political Parties Are Imperative Part of Processes of Government

Part and parcel of these "processes of government" in this republic are our political parties and their mechanism for expression and action. It is imperative that we have them. This *is* a government by political party. In such units *principles* must be dominant. Declared principles of political parties are translated into action only as the electorate delegates to such party administrative and legislative authority. The personality chosen should stand committed to the principle approved by election.

These political parties must be strong, sound and stable, and likewise their chosen representatives, in order to be properly effective. They must stand on principle and not sponsor selfish objectives. They must declare and act for the good of the whole people and not for special groups. Their leadership must be by the best and highest type of their membership, not by the mediocre—by men who exhibit statesmenlike qualities, not mere political dexterity—by men who are willing to sacrifice personal comfort, and economic advantage and benefit and accept a public trust—and thus effect a contribution to the public welfare of their community, their State, and their nation.

Affiliation and Activity Are the Duty of All Citizens

These political parties and their designated leaders must have the allegiance and the loyalty of all of the substantial, intelligent, sound thinking electors who approve their declared beliefs and principles and who hope for the attainment of the respective objectives.

I conceive it the duty of every citizen of this republic to affiliate with that political party which most nearly represents his best and most unselfish thinking, and to work actively within such party for the declaration and maintenance of only sound theories in accordance with the fundamental principles of our constitutional system and for unselfish objectives that may benefit the mass and advance the good of mankind.

This kind of allegiance demands participation in the processes of party machinery; it requires active and continual devotion. It of necessity requires your intelligent, considered thought and deliberation, your attendance at the precinct caucus or convention where every party effort and selection of representatives and candidates for office begins, and your active and aggressive participation in party primary elections, and the selection at such level of tried and true believers in known sound principles. Such type of representatives designated at the lowest level of political action will, in their determinations made at the upper levels, never go far wrong.

The Present Challenge to the Lawyer-Citizen Is Imperative

To the lawyer-citizen comes the challenge now and here presented:

Your education in the history of institutions protecting freedom of the people, in the history of our own nation, in the Constitutions and laws, both federal and State, your knowledge of the processes of government and of political parties and their true purposes, your ability to analyze and point out the pitfalls of incorrect thought and action, and your peculiar position in our social structure as the confidants and advisers of our people on matters beyond your strict professional field, impose upon you a great public obligation. Involved in it all is a duty to see that the foundations of free government are not shaken, that sound thinking and action prevail in the body politic, that the citizenry stand aroused to the constant dangers that lurk at every turn and every diversion and to the imperative necessity of constant vigilance.

The sole and only method by which the people may be assured of continued security and stability of a free government as we know it, is their own regular, constant, intelligent and determined participation in all processes of government represented by elections provided in all units and by their like personal activity in the processes of political party machinery.

Thus—and thus only—will great principles prevail, the true purposes of free government be regularly pursued and unselfish men and women grounded in sound theories and with high, unselfish purpose be designated for all places of authority to administer a government under law and not by men.

Lawyer-Citizens Should Take the Lead To Save and Perpetuate Free Institutions

Rightfully, and properly, the lawyer-citizen should take the lead—the lead to save and preserve, to stabilize and perpetuate free institutions, the lead in arousing our people to accept the duties and obligations of citizens by exercise of thought and action in all of these processes of government.

Let us accept that challenge. Let us pledge ourselves to our own regular, continued and unselfish participation. Let us preach this effort to our own, our neighbors, our friends, our communities. Let us join in such a common effort in our own commonwealth. Let us lead in the nation to bring about a participation throughout the land by all intelligent, sound thinking, stable citizens in all of these processes of government as we have them and know them.

In the leadership of such a movement you will effect an unselfish contribution of immeasurable benefit to the welfare of your country and its people. The nation will function as visualized by the founders. The republic will be safe and secure. And as our neighbors look on, the example of our own system so presented to the world, will command the ad-

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Challenge to the Lawyer-Citizen

miration, respect and envy of all the peoples of the world and be a tremendous force in stabilizing their views, beliefs and action in perfecting their own national structures.

To accept this challenge, to take the leadership, to follow it through and effect its true purpose and intent, would fully justify the existence and maintenance of our great profession as the strong arm of a government dedicated to liberty of the individual and his right to freedom in thought and action, freedom to work, freedom of competition and freedom of private enterprise. To neglect it now—and henceforth—may hazard, seriously endanger, and possibly destroy, these liberties and rights which we prize and value most.

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Association Offers Specific Solutions for Marriage and Divorce Law Evils

■ Sustained efforts by the organized Bar toward specific solutions of the increasingly complex legal and social problems in the fields of divorce, marriage and family laws were assured by action of the House of Delegates in Seattle. On September 7 the House adopted recommendations made to it by Judge Paul W. Alexander, of Toledo, Ohio, on behalf of the delegation which represented our Association at the National Conference on Family Life, held in Washington, D. C., on May 5-8.

Specifically the recommendations approved by the House (1) urged the President of the United States to appoint a commission to re-examine marriage and divorce laws; (2) urged further extension of family and juvenile Courts; and (3) authorized the appointment of a special committee within the Association to deal with divorce and marriage laws and family Courts.

The report to the House by Judge Alexander's group and the subsequent action thereon grew out of activities of the Association's delegation in organizing and conducting the Legal Section of the National Conference (see 34 A.B.A.J. 448; June, 1948). A preliminary report of the delegation appeared in the JOURNAL in March (page 195) when Reginald Heber Smith, of the Massachusetts Bar (Boston), was acting as Chairman of the group. Later Mr. Smith's duties as Director of the Survey of the Legal Profession compelled his resignation as Chairman of the delegation, and Judge Alexander, whose family Court in Toledo, Ohio, recently received nationwide attention in *Life* magazine, was named as Chairman. Other members of the delegation were Miss Charlotte E. Gauer, of Illinois; Clarence Kolwyck; of Tennessee Willam P. McCracken, of the District of Columbia; William L. Ransom, of New York; and Mr. Smith.

Committee Report Outlines Activities at the Conference

Although the Legal Section of the National Conference on Family Life reached three specific recommendations, the Conference as a whole was not asked to adopt them as resolutions in view of the widely different fields of activity of the 125 supporting organizations constituting the Conference. "That would have meant asking persons to vote on matters beyond their competence and would have been unfair," Judge Alexander said in his report. The Section did, however, "earnestly request the appropriate officer or officers or body of the Conference promptly to pursue the recommendations as submitted, with a view to obtaining action thereon". These recommendations were:

1. That the President of the United States be asked to appoint a Commission to re-examine the laws regulating marriage and divorce and legal proceedings in divorce cases.

2. That the Conference urge establishment of family and juvenile Courts presided over by specialist judges and having adequate quarters, staffs and budgets.

3. That the Conference urge immediate extension of legal aid officers and low cost legal services.

Action on the third of these recommendations to the Conference was not asked from the House, since the Association has been emphatically on record in this regard through the work of its Committee on Legal Aid Work and Committee on Low-Cost Legal Service.

Presidential Commission Urged To Study Vexing Problems

The first recommendation of the delegation, adopted unanimously by the House, was:

> That the American Bar Association approves the first recommendation by its representatives to the National Conference on Family Life as follows:
>
> This National Conference on Family Life records its convictions (1) that our present divorce laws are producing widespread evils, and (2) that our laws in the field of domestic relations, instead of constituting a bulwark, are themselves a continuing threat to the stability of marriage in contemporary America.
>
> Therefore, this Conference respectfully urges the President of the United States to appoint a commission of ten or more citizens to re-examine our laws regulating both marriage and divorce, and our legal proceedings in divorce cases, in terms of their objectives, methods, and facilities; their results;

and in the light of the social role they have to play in the preservation of the American home.

Such citizens should be outstanding leaders drawn from the fields of law, religion, medicine, education, and sociology.

Judge Alexander noted in his report that the suggested commission follows the precedent of the Commission on Higher Education, whose reports have received nationwide attention. He said also that since the proposal is entirely non-political, "it should not formally be presented until after the political excitements of a presidential election year are over". Then, he declared, it should be put forth promptly.

Family and Juvenile Court Movement Gets Impetus

In its second recommendation, also adopted unanimously, the delegation asked:

> That the American Bar Association approves the second recommendation by its representatives to the National Conference on Family Life as follows:
>
> This National Conference on Family Life urges the further extension and establishment of family Courts and juvenile Courts in accordance with these principles: (1) such Courts should be presided over by judges who devote themselves to, and thus become specialists in, these fields; (2) such Courts should have adequate hearing rooms, chambers, and other facilities suitable to their special purpose; (3) such Courts should have adequate staffs including probation officers, psychiatrists, doctors, investigators, and social case workers; (4) such Courts should have more generous budgets so that proper personnel can be attracted to and kept in these positions.

"Reform of the divorce laws will do no good unless we can establish new procedures in Courts which are especially designed and equipped for this purpose," the report of the delegation stated in regard to this recommendation. Judge Alexander declared that these "family Courts" should have jurisdiction over all problems, civil and criminal, that directly affect the family or its members, and should be able to provide both legal and equitable remedies.

Although admitting that these Courts "will cost more money than the typical divorce Court costs today *in terms of money*", the report declared that the American people must be shown "that the total cost of the administration of justice is no more than a drop in the bucket of national or State expenses, and further that the cost of our present divorce system *in terms of human tragedy* has become too high to be tolerated any longer".

Special Committee Authorized To Implement Recommendations

Thirdly, the delegation recommended, and the House unanimously approved, the following:

> That a special committee of the Association be appointed to carry forward the proposals embodied in the above resolutions. It is suggested that the committee be named "Special Committee on Divorce and Marriage Laws and Family Courts".

"To continue as a 'delegation' seems awkward," Judge Alexander's report stated. "A special committee fits into the operating structure of the Association." He explained that the National Conference on Family Life has no power to bind its members and so will take no affirmative action itself. It will continue as a liaison body through which the new committee will reach and enlist the support of powerful allies. By prompt and decisive action, he said, "the Association can make a major contribution to the stability and moral health of the American family, and so to the well-being of our nation".

"Politics Often Impede Able Public Officials"

[Leading editorial in the Seattle *Times*, September 19, 1948.]

■ Members of the American Bar Association, whose national convention recently was concluded here, have received a valuable suggestion from a member of the Seattle Bar concerning one defect in popular government in the United States. In an article in[1] the AMERICAN BAR ASSOCIATION JOURNAL, Edward W. Allen, Seattle attorney, and president of the International Fisheries Commission, asks Bar Associations to give consideration to means of improving the standards of legal administrative officers—attorneys general, district attorneys and prosecuting attorneys.

Allen points out that under the American system, "it is primarily to attorneys general that the public must look for action against official corruption . . . But attorneys general," he says, " are notorious for neglect in the matter of malfeasance in office."

Allen attributes the weakness he decries partly to the political selection of these officials, which often places men of mediocre ability in office, and partly to the party system itself, "which makes it embarrassing for even the honest and able incumbent of such office to expose members of his own administration except in instances so glaring that it becomes good politics to do so".

The remedy proposed in the case of the States is the election of attorneys general and prosecuting attorneys on a non-partisan basis, as judges are elected in our State. In the case of United States officials, where the Attorney General is necessarily named by a partisan administration, Allen makes a novel suggestion—appointment by the minority party in Congress of a "counter-official" to the Attorney General, charged with the duty of investigating the conduct of federal officials and the prosecution of delinquents.

The first idea seems entirely feasible. Whether the second would serve to introduce a new opportunity for political partisanship and groundless attacks on political opponents is open to question. Allen's suggestions, however, are worthy of serious consideration by the Bar, here and elsewhere. Instances which give point to this discussion have not been lacking in our own State.

1. The editorial is based on Mr. Allen's contribution to our August issue (page 729).

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Administrative Procedure:

Shall Rules Before Agencies Be Uniform?

by Arthur T. Vanderbilt • Chief Justice, Supreme Court of New Jersey

■ One of the most dynamic and remedial undertakings by our Association, announced and explained at the Annual Meeting, is that which will explore, draft, and in good time accomplish, the practicable extent of uniformity in the rules of procedure and practice to be applicable to federal administrative agencies, by way of implementing and supplementing the Administrative Procedure Act sponsored by our Association. At this initial stage, difficulties and problems—for example, as to the practicable extent of uniformity—are explored, along with the manifest need for early and substantial progress toward uniformity, which has been accomplished as to the rules in the federal trial Courts, as well as in many State Courts.

After Senator Alexander Wiley, Chairman of the United States Senate Committee on the Judiciary, and Senator Pat McCarran, ranking minority member of that Committee and stalwart sponsor of the McCarran-Sumners bill which became the Administrative Agency, had given legislative background and ably discussed numerous specific proposals for curbing further the abuses in administrative law and federal agency procedures, Chief Justice Vanderbilt fired the "opening gun" in what may be a long, hard fight for practicable uniformity in agency practice and procedures. His address before our Section of Administrative Law will be read and studied with interest by all lawyers who have to deal from time to time with federal agencies.

The principle or objective of uniformity in rules governing agencies so numerous and diverse in their present procedures is one thing; the extent of practicable and desirable uniformity, and the means and time-schedule of obtaining it, are another. Faithful to our Association's tradition and practice of hearing and weighing opposing or differing views, the Section of Administrative Law listened also most profitably to a strong and specific statement by Professor George T. Washington, Assistant Solicitor General of the United States, who presented very concretely many of the practical problems and difficulties which will be encountered in the quest for uniformity in rules and practice and will undoubtedly receive full consideration by draftsmen and legislators. Professor Washington has promised the *Journal* that we shall have a revised text of his paper in time for our November issue, and we commend it in advance to those who now read the presentations made by Senator Wiley and Chief Justice Vanderbilt.

■ For almost a year, aided by scores of judges and literally thousands of lawyers, I have been working on rules of practice, procedure and administration of all the Courts of New Jersey. A week from tomorrow three new Courts will replace nine old ones. Simplified rules, modelled largely on the federal rules, will supersede a diversity of rules.

This experience has quite naturally made me think: Why so many administrative agencies? Why in particular so many affecting a single industry? And why different rules of procedure for every agency? Federal administrative regulation of railroads, for example, involves many agencies. The Interstate Commerce Commission is popularly assumed to have exclusive jurisdiction over railroad affairs. But in the field of railway labor, there are also the National Mediation Board,[1] the Railroad Adjustment Board,[2] the Railroad Retirement Board,[3] and numerous "emergency boards" appointed specially for strike cases under the Railway Labor Act.[4] The Post Office Department has important jurisdiction with respect to railway mail transportation. The Office of Defense Transportation (still in existence) continues to exercise important controls. In times of war or other emergency, various temporary agencies have jurisdiction over such matters as allocations of materials for op-

1. The Mediation Board certifies collective bargaining representatives, mediates disputes between employees and carriers, and performs other similar functions.

2. The Railroad Adjustment Board decides employees' contract claims under agreements entered into between carriers and the collective bargaining agents of their employees.

3. The Railroad Retirement Board administers the retirement system for employees and determines claims for benefits thereunder.

4. The "emergency boards" are called upon to make reports and recommendations during the statutory "cooling off" period preceeding railroad strikes.

erating or construction purposes. In peace various federal agencies are involved in such matters as granting permits for railroad radio communication, in which connection the Federal Communications Commission must act. The Department of Justice enforces against railroads various criminal statutes of a regulatory character and in recent years has brought anti-trust prosecutions. And then, because the federal government is a large business operation, a host of federal contracting officials under various laws call upon railroads to perform what would otherwise be commercial operations.

Duplicate and Overlapping Federal Agencies and Regulation

Another interesting, and in some ways more perplexing, example of truly duplicate and overlapping federal regulation is to be found in the field of food, drugs, and cosmetics. Three agencies have jurisdiction over the same things. In the matter of advertising, the Federal Trade Commission exercises administrative jurisdiction and issues orders to cease and desist from representations in advertising deemed untrue, unfair, or misleading. The Post Office Department does the same thing through so-called "fraud orders", if the use of the mails is also involved as it almost invariably is. The Food and Drug Administration under the Food, Drug, and Cosmetic Act trebles the regulation by causing the institution of proceedings respecting allegedly untrue or misleading representation on labels or accompanying literature; but here the cases are systematically investigated and worked up administratively, and then submitted to Court and jury for decision.

Hence, in this field, one who markets a drugstore product, for example, may be subject to administrative investigation by three agencies, to administrative orders by two, and to judicial proceedings at the instance of a third. In one respect, at least, the judicial proceedings administratively brought are more burdensome than the administrative order proceedings, because they are often multiple in nature and may involve the same private party in dozens of actions in different judicial districts respecting the same product. These are matters which have doubtless been receiving the attention of the Hoover Commission. Complicated rules of procedure, however, can be almost as burdensome as conflicting and multiple jurisdictions—and as outmoded.

Administrative Law Development Needs To Be Conformed to the Law

Administrative law has been rightly called the outstanding legal development of the twentieth century. Its place in that regard, in our times, is comparable to the expansion of legislation in the nineteenth century and the growth of equity in the eighteenth. As a matter of fact, it was those developments of the two previous centuries which formed the legal groundwork for administrative law. For legislation gives us modern administration. It creates agencies, endows them with what regulatory powers they have, prescribes broadly the methods by which they must operate, and limits the scope of their activities. And the great equitable concepts have furnished the goal of an adaptable form of justice in which the merits of controversies are placed above form and circumstance.[5]

Although our present-day administrative law is to be linked with centuries of legal developments which pass by other names, the matter is not to be rested on that academic level. Like equity in the other centuries, administrative law is new in ours. Like equity in the last century, it still remains for administrative law to be fully absorbed into the body of our legal institutions. Unless it is to linger as a sort of quasi-law or alien intruder, it must be taken into the family, as it were, and made to bend to our tasks and customs.

Two Phases of Bringing Administrative Law into Our American System

In recent years we have witnessed two phases of development in the direction of bringing administrative law into line with our American ways. We first had ten years of studies. The American Bar Association led the way through the establishment and activities of its Special Committee on Administrative Law in the 1930's. In 1937 the President's Committee on Administrative Management made significant recommendations. Senate hearings in 1938 dealt with the proposal to create an administrative Court. The years 1939 and 1940 saw the movement which led to the passage and presidential veto of the Walter-Logan bill. That led, in turn, to the creation of the Attorney General's Committee on Administrative Procedure, its extended studies, and its final report in 1941. Although the several legislative proposals which followed were cut short by the exigencies of war, enough had been done to demonstrate that something more required doing when the times permitted.

With the end of the shooting phase of World War II in sight, Congress began the reconsideration of legislation dealing with the forms and methods of federal administrative law. In 1946 each house of Congress unanimously adopted, and the President approved, the Administrative Procedure Act which by its terms became, or is to become, effective in 1946, 1947 and 1948.[6]

Second Phase of Bringing Administrative Law into Line with Our Institutions

This statute inaugurated what I think will be readily observable as the second phase of development in bringing administrative law into line with our institutions. Among other things, there was left unsettled the problem respecting admissions to administrative practice—a matter which has been receiving subsequent legislative attention.[7]

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5. See *Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 125, 142; *Morgan* v. *U.S.*, 304 U.S. 1, 14-15; *U.S.* v. *Morgan*, 307 U.S. 183, 191.

6. On the assumption that the year 1948 will see the unconditional appointment of Hearing Examiners as a result of the work under way by the Board of Examiners designated by the Civil Service Commission.

7. See H.R. 2657 and H.R. 7100 of the 80th Congress, the hearings thereon, and the statement of Sub-committee Chairman Gwynne in the *Congressional Record* for August 4 at pages A5074-A5078.

Secondly, examiners are yet to be unconditionally appointed under the Administrative Procedure Act—a task which awaits the report of the Board of Examiners designated by the United States Civil Service Commission. Each of these two matters, in very different ways to be sure, is related to the legislative policy inaugurated by the Administrative Procedure Act.

Uniform Rules of Administrative Procedure a Third Task

And there is a third related matter, uniform rules of administrative procedure, which I desire to discuss. Before I do that, however, I wish to recall to your attention another line of legal development which began in the 1930's.[8] You will remember that in 1934, after more than twenty years of urging by the American Bar Association, Congress—without a dissenting vote—authorized the formulation of uniform rules of civil procedure for the trial Courts of the United States. That project also resulted in the union of practice and procedure in both law and equity. In 1938 a similar project was proposed for the field of criminal law.[9] As a result we now have uniformity of practice and procedure in such diverse fields as law, equity, admiralty, and criminal law, in all their variations and complexities. I mention these rule-making projects in the field of judicial procedure for two reasons—first, because they show that our law is developing in the direction of consolidating and simplifying its methods of operation, and, secondly, because it is my theme today that the same should be at least as desirable in the field of administrative justice.

Uniformity in Administrative Procedure as a Logical Development

With this background, uniformity of practice and procedure in the area of our federal administrative law, it seems to me, is a natural and logical development. It may be viewed either as one more step in the making of uniform rules begun in 1934 or as the final step in the phase of legal consolidation begun by the adoption of the Administrative Procedure Act. Perhaps it is a bit of both. Certainly it has its roots and analogies deep in our legal system, and obviously it would culminate the reforms advocated in the studies I have mentioned and legalized by the act of 1946.

Since utility is the keynote of today's legal philosophies, I presume we should first consider how uniform rules of federal administrative procedure will benefit either the people, their government, or the two jointly. In mentioning this phase of the matter, I shall not regard myself as required to defend law as against anarchy, rule as against discretion, or uniformity as against disparity. I take it that we may assume that simplicity is a good thing if it is feasible.

Knowledge and Certainty of Rules Will Benefit the People

Secondly, I trust we may assume that knowledge and certainty of the rules will benefit those who are regulated. Put these two things together and you have the reason why feasible simplicity of rules of administrative procedure will aid those who are regulated by conveying to them both knowledge and certainty. For when the procedures of nearly a hundred federal agencies[10] are not only meaninglessly diverse but changing week by week, enlightened only by the feeble glow of the *Federal Register*, clients and lawyers alike can have only an imperfect knowledge and no practical certainty of the ways of federal regulatory agencies.

To be sure, great strides have been made through the Federal Register Act and Section 3 (a) of the Administrative Procedure Act. Pursuant to the latter, federal agencies have now for two years been restating their rules of practice and procedure. As anticipated, these are helpful to those who specialize. But their diversity still baffles both the general practitioner and the citizen who becomes involved, or whose business keeps him involved, in administrative processes. Moreover, unlike Court procedure, the citizen is often directly subject to continuing personal contact with administrative agencies. The administration of the revenue laws is a good example. And, while there are at most but few Courts in any judicial district, a hundred federal regulatory agencies may operate there because their jurisdiction is nationwide.

Two Paramount Reasons for Uniformity of Rules

Viewing the question from the standpoint of the government and the governmental agencies themselves, I believe there are at least two paramount reasons why feasible uniformity of rules of regulatory practice and procedure would be an aid rather than a hindrance. In the first place, uniformity and simplicity are of as great aid to government officials as they are to private lawyers. As a matter of fact, since the government is a giant organization, whatever simplifies and makes understandable its operations to those who serve in that organization is something that no far-sighted administrator can afford to overlook.

And even if administrators prefer unnecessary complexity, the public has an overriding right to any efficiency obtainable through uniformity of methods, procedures, and practice. Of even more importance is the fact that feasible uniformity and simplicity will improve governmental public relations. It is just as important for governmental programs and agencies to have good public relations as it is for a member of Congress to have the approval of a majority of his constituents. The lack of public support is as fatal to the one as to the other. The history of some of our recent war agencies is proof of this.

You will note that I have been

(Continued on page 974)

8. For more than 100 years there had been uniform rules of procedure in equity and admiralty.

9. Previously uniform rules of criminal procedure after verdict had been prescribed.

10. The number varies according to the method of counting. See notes 1 and 2 of the final report of the Attorney General's Committee on Administrative Procedure.

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Communism and Communists:

Association Votes Support of Mundt-Nixon Bill

■ As was to be expected, one of the foremost matters of interest and concern to members of both the Assembly and House of Delegates in Seattle September 6-9 was that our Association should take a strong stand, and recommend measures protective of our country, as to the infiltrations and aggressions of Communism and Communists in our government and in the political and representative organizations of the United States, including our own Association. As to the latter, some difficulty was experienced in formulating and adopting an acceptable form and basis of recommended action, although no substantial disagreement in principle was manifest. A chief difficulty appeared to be that proposals emanated from several sources, without integration before submission, and the sessions of the Annual Meeting, interspersed with Seattle's unforgettable hospitality, did not give a ready opportunity for ironing out differences of opinion and arriving at a consensus.

The task was nevertheless accomplished. The Assembly voted an emphatic stand against lawyers who "publicly or secretly" aid Communism, in which the House concurred. The House also gave strong indorsement to the Mundt-Nixon bill (H.R. 5852 in the 80th Congress) to define and curb Communist offenses against our form of government. The expulsion of proved members of the Communist Party from our Association was recommended. Refusal of a member of our Association, summoned before a constituted inquiry, to answer questions as to whether he is or is not a Communist, was declared to be "compelling cause" for his expulsion from our Association. The final actions taken appeared to be, in the aggregate, effectively declaratory of the attitude expressed in our August editorial: "The Point Where Toleration Ends" (page 696). The following report of the debates and votes is an interesting narrative of the deliberative processes by which decisions are arrived at and acceptable actions are formulated in the representative bicameral system which governs policy-making in our Association.

■ The first development toward carrying further our Association's stand as to Communism and Communists in the United States, supplementing the findings made and the principles of legislation recommended by the House of Delegates last February (34 A.B.A.J. 281; April, 1948), came at the opening session of the 1948 Annual Meeting in Seattle's great Civic Auditorium when the constitutional opportunity was afforded for the offering of resolutions by individual members from the floor of the Assembly. Edwin M. Otterbourg, of New York, proposed the following resolution, which was referred, without debate at that time, to the Committee on Resolutions for consideration and report to the Assembly:

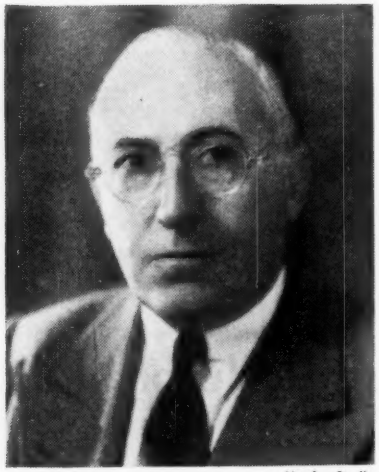
WHEREAS, Communism as it actually operates is an international conspiracy teaching loyalty to Russia and treachery to this nation; its purpose is to disrupt, disable and finally destroy the American way of life; it operates as an agency of a foreign power actively seeking to weaken and then destroy democratic government everywhere; it infiltrates its members into labor unions and key industries so that in time of peace they can foment strife and industrial dislocation and in time of war they can sabotage, disrupt and spread confusion, all in the interest and at the direction of a foreign power; and

WHEREAS, the individual Communist has no loyalty to this nation but yields his allegiance to an alien group whose bidding he does without question, and whose aim is to eventually establish an implacable dictatorship in all countries; and

WHEREAS, in those countries where Communism has gained control, civil rights, as we know them, have ceased to exist, and those who defended such rights have been imprisoned or liquidated; and Communistic activity in the United States threatens the civil rights of all citizens;

NOW, THEREFORE, BE IT RESOLVED, That the American Bar Association hereby determines and declares that any lawyer who publicly or secretly aids, supports or assists the world Communist movement to accomplish its objectives in the United States, by participating in its program, whether he be an avowed party member or not, is unworthy of his office and should not be permitted to become or remain a member of the American Bar Association;

RESOLVED, FURTHER, That copies of



Hessler Studio

EDWIN M. OTTERBOURG
Author of Anti-Communist Resolution

this resolution be forwarded by the Secretary to all Bar Associations in the United States for their consideration and appropriate action.

At Wednesday's "open forum" session of the Assembly, the Committee on Resolutions, of which Roy Bronson, of San Francisco, is Chairman, reported the foregoing resolution favorably; and it was unanimously adopted by the Assembly. When the Assembly action was reported to the House of Delegates on Thursday, the latter concurred without a dissenting vote.

House Votes Emphatic Action on Several Angles

The House of Delegates, after debating the matter at two different times, directed the Board of Governors that in acting on expulsion of members from the Association, the Board shall consider as "compelling cause" for such expulsion a member's refusal to answer whether or not he is a Communist, before a Court, Congressional investigating committee or other duly constituted legal authority. The action was taken on September 7 when the House adopted by a voice vote a substitute resolution, which had been proposed to replace a similar resolution submitted by the Committee on the Bill of Rights and approved by the House on the previous day (September 6).

Acting on another resolution offered by the Bill of Rights Committee, headed by Robert R. Milam, of Florida, the House on September 6 gave approval to the Subversive Activities Control Act (H.R. 5852 in the 80th Congress), popularly known as the Mundt-Nixon bill. In presenting this resolution Mr. Milam declared that the measure will help to carry out the action of the House at its mid-year meeting, at which time it adopted strong resolutions defining the world Communist movement and advising measures to resist and control it in the United States (34 A.B.A.J. 281; April, 1948). As to the Mundt-Nixon bill, Mr. Milam said: "It is the most enlightened legislation that has yet been formulated to combat this threat of Communism. It may not be a perfect bill, but our function in the House is . . . to take that legislation which commends itself to us as well-founded and serving a proper purpose."

Emphatic Vote for Expelling Proved Members of the Party

Efforts to arrive at an adequate and acceptable declaration were initiated in the House when that body, at its first session on September 6, approved a resolution emanating from the Board of Governors, which recommended the expulsion from membership in the Association of a proved member of the Communist Party. This read:

> WHEREAS, lawyers are officers of our Courts and as such take an oath to support the Constitution of the United States; and
>
> WHEREAS, it has become apparent that many in our government and elsewhere have allied themselves with forces dominated by Communists bent upon the destruction of our form of government; and
>
> WHEREAS, the lay people of our nation have the right to expect all lawyers to be loyal only to our government and membership in the Communist Party is inimical to the oath taken by a lawyer and to the principles and policies of the American Bar Association;
>
> NOW, THEREFORE, BE IT RESOLVED, That the Board of Governors of the American Bar Association recommends to the House of Delegates that any member of this Association who is proved to be a member of the Communist Party be expelled from this Association.

This resolution was adopted by the House, but another Board action, declining to admit to membership in our Association persons who were proposed but stated that they were then members of the National Lawyers Guild, was reported to the House, debated, and aroused considerable opposition. Finally it was referred back to the Board for further consideration and report. It was evidently the feeling of the House that such a rule or policy should be based on ascertained and stated facts, and not on information and experience of individual members with the Guild or on the findings of the Thomas Committee in the Congress.

Members' Refusal To Answer Whether They Are Communists

The debate and division in voting on this early action accentuated the differences in individual and representative opinion which at the outset was manifest among the delegates on the issue of expelling Association members for refusing to answer the familiar inquiry: "Are you or are you not a Communist?" In first presenting this matter to the House on September 6, Mr. Milam stated that his Committee had taken jurisdiction of the subject-matter by direction of the Board of Governors, which referred to the Committee a letter written by Herbert W. Clark, of San Francisco, to President Gregory. Mr. Clark, who has been a member of our Association since 1913, after explaining that he could not be present at the Seattle meeting, declared in his letter that the Association "should summarily expel all members who have refused, on the grounds of constitutional privilege, to say to a Congressional committee whether or not they were or are Communists, and that the American Bar Association should recommend to the States of their admission to start disbarment proceedings against them".

Mr. Milam reported that the Board of Governors had expressed sympathy with the purposes enumerated in the letter and that his Committee had considered it. Before the Committee had completed work on

its resolution, the Board of Governors adjourned its meetings, and the Committee was not therefore able to report back to the Board.

Resolution from Committee Is Debated and Adopted

For that reason, Mr. Milam explained, the resolution (of which no copies were at the time before members of the House) was being presented directly to the House without action or recommendation by the Board of Governors. Mr. Milam offered the resolution as follows:

> RESOLVED, That the American Bar Association do expel any member who has refused on the ground of constitutional privilege to state to a Congressional committee or sub-committee whether or not he is or was a Communist, and that the American Bar Association should recommend to the States of their admission to start disbarment proceedings against them.

George M. Morris, of the District of Columbia, moved that the resolution be referred to the Board of Governors for study and report to the next meeting of the House. David F. Maxwell, of Pennsylvania, suggested that it would be more appropriate to refer it to the Committee on Resolutions. Mr. Morris would not accept this as a substitute for his motion and a vote was taken on the Morris motion. By a divided vote it was defeated, 52 to 44.

In the only debate on the resolution which took place at this session of the House, Whitney North Seymour, of New York, termed the measure "shocking", and declared that while he believed that a Congressional committee had the right to inquire into the political affiliation of a witness, "there can be no doubt that a witness who is interrogated and who believes that his answer may have serious consequences has a right to invoke his constitutional privilege, and it seems to me wrong for the Association to treat so lightly that constitutional right". After mentioning the federal indictment in New York of twelve leading members of the Communist Party, Mr. Seymour said: "I submit that in the teeth of that indictment raising a question as to whether or not membership in the [Communist] Party might be unlawful, a lawyer was entitled without penalty to protect himself against that question until that case was determined . . . and it is improper for us . . . to prejudge the legal questions involved in that indictment . . ."

When the question was put to a vote a division resulted; on a standing vote, the resolution was approved, 54 to 50.

A Reconsideration Is Obtained and a Substitute Offered

At the second session of the House, on September 7, Thomas B. Gay, of Virginia, moved that the above-quoted action of the House be reconsidered, on the ground that Section 3 of Article II of the Constitution of the Association vests sole authority to censor, suspend, or expel any member for cause in the Board of Governors, after a hearing. The resolution, Mr. Gay contended, would have the effect of amending the Association's Constitution by expelling certain persons, apparently without action by the Board of Governors.

After Mr. Gay's motion to reconsider was carried, he offered the following substitute resolution for that of the Bill of Rights Committee:

> RESOLVED, That, in considering the the matter of the expulsion of a member of the Association, the Board of Governors, when proceeding under Article II, Section 3 of the Constitution, shall consider as compelling cause for such expulsion, the fact that any member has refused, on the ground of constitutional privilege, to state to any Court, Congressional committee or other duly constituted legal authority, whether or not he is or was a Communist.

Mr. Gay explained that the substitute sought to conform the purpose of the Committee's previous resolution to the requirements of the Association's Constitution. He also pointed out that his substitute did not embody the second part of the original resolution, which called upon States to seek disbarment of persons expelled on this ground by our Association. "It seems to me," he said, "that this is reaching down into the local affairs of the State and local Associations and we better let that alone."

Resolution Is Debated and Opposed

The emphatic character of the views being formed on the subject was again apparent as debate began on Mr. Gay's substitute resolution. Mr. Morris, recalling that on the previous day he had simply moved to have the matter put through the regular channels to the Board of Governors, stated that he now thought it was "plumb ridiculous" for the House to take action on a matter about which it had not thought before and on which the Board of Governors had not reported. Continuing, Mr. Morris said:

> . . . Why should we here prejudge the right of any man, particularly who is, so far as we know at the moment, in good standing as a member of the legal profession, to plead his cause before a Court and have a Court decide whether or not it is constitutional privilege to refuse to answer that type of question?
>
> . . . we say that any man who claims his constitutional privilege on a question asked him by a Congressional committee is unfit to associate with us. Well, think that over!

In answering a question put by W. E. Stanley, of Kansas, as to the meaning of the words "compelling cause" as used in his resolution, Mr. Gay explained that his resolution did not cut off the member's right to a hearing before the Board of Governors, as provided in the Association's Constitution, but that if the member admits that he has refused to answer the question of whether or not he is or was a Communist, "there is put upon the Board the duty of finding there is compelling cause for suspension".

Charles A. Beardsley, of California, objected to the resolution because by the use of the words "or was", it was telling the Board "that it must expel any member who has in the past done something that wasn't a ground for expulsion when it was done".

Cuthbert S. Baldwin, of Louisiana, declared that he does not believe that Communism is a political party,

(Continued on page 976)

14

Charles Evans Hughes, 1862-1948:

America's Great Diplomat-Jurist Dies

■ Our profession was plunged into sorrow on August 27, 1948, when Charles Evans Hughes, retired Chief Justice of the United States, President of our Association in 1924-25, distinguished leader and spokesman of our Association's memorable pilgrimage in 1924 to the Bars of Britain and France, recipient of our Association's Gold Medal in 1942 for "conspicuous services to American jurisprudence", died in Wianno, Massachusetts.

■ Chief Justice Hughes was born in Glens Falls, New York, on April 11, 1862. He attended Colgate University and was graduated from Brown University in 1881. Three years later he received his law degree from Columbia University.

In 1888 he married the former Miss Antoinette Carter, who died several years ago.

He early earned wide reputation as a forceful lawyer in the Courts of New York. His first public prominence came as a result of his vigorous prosecution of State investigations into the conduct of the gas companies and later the insurance business. He was nominated for the governorship of his native State in 1906, on the strength of his success in the insurance investigation and was elected. He was re-elected Governor in 1908.

In 1910 he was appointed by President Taft as an Associate Justice of the United States Supreme Court. In 1916 he resigned to accept the Republican nomination for the Presidency. He lost the election to President Woodrow Wilson by a narrow margin. From 1921 to 1925 he served as Secretary of State for Presidents Harding and Coolidge.

Hughes was appointed as the eleventh Chief Justice by President Herbert Hoover in February, 1930, and retired in 1941. At the time of his retirement the JOURNAL devoted its July, 1941, issue to material concerning his many-sided career.

The outstanding accomplishments of Mr. Hughes were in three fields. As judge, administrator, and diplomat; but all were based on his devotion to the law. His administrative ability, which was largely the capacity to make rules for conduct, was displayed in all the offices he held—Governor, Secretary of State, Chief Justice. As Secretary of State he was a most ingratiating representative and his efforts were directed towards world peace based on international law. While holding that office and the Presidency of the American Bar Association, he led the American lawyers on their pilgrimage to England. He met the exacting requirements in a fine way and took advantage of the occasion to strengthen permanently the relationships of all English-speaking peoples. His inspiring response to the welcome of Lord Chancellor Haldane is a glorious exposition of the common law as the common understanding among those peoples. As Associate Justice and as Chief Justice he demonstrated analytical skill, perspicuity, courage, clarity, and a sound understanding of the law.

He was a moving and persuasive speaker, and could write with lucidity and vigor. But he will not likely be remembered for style of expression. He was not interested in style as such. He did not practice the arts of the orator, writer, or diplomat. He was not concerned about the niceties of those specialties. He was not an inspired reformer. His inspiration was from the spirit of his profession, and he was actuated by the fundamental principles of Anglo-American jurisprudence. His own life is an exemplification of the professional mission which he put before the lawyers of England and America in Westminster Hall, as

> . . . our privilege, opportunity and responsibility as ministers of justice in a world which needs justice, and the reasonableness which makes justice possible.

In that same address he used a quotation which indirectly portrays the influence of the law in his own life. He said:

> It is this spirit of the common law, which in the eloquent words of Mr. Justice Story ". . . has become the guardian of our political and civil

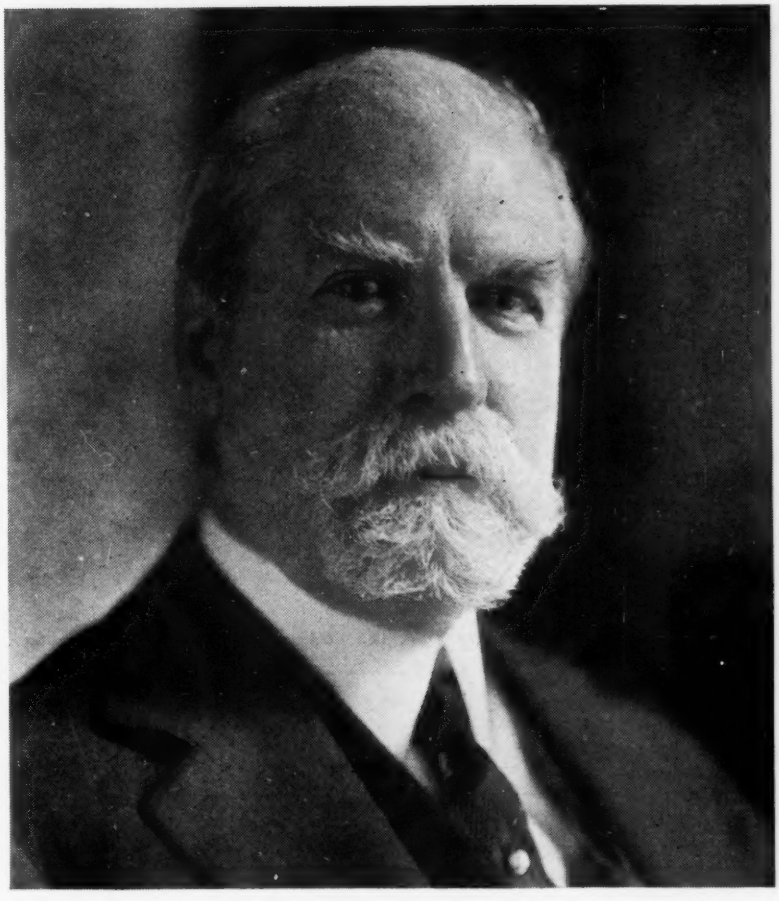
rights; it has protected our infant liberties, it has watched over our maturer growth, it has expanded with our wants, it has nurtured that spirit of independence which checked the first approaches of arbitrary power, which has enabled us to triumph in the midst of difficulties and dangers threatening our political existence; and by the goodness of God, we are now enjoying under its bold and manly principles the blessings of a free, independent, and united government."

His identity with the law is portrayed by the very fact, noted above, that all factions placed reliance in him. He could not be classified by the cliches of easy speech. The true servant of the law does not bear the marks of the factional branding-iron. He was so devoted to the law that the strength of its character became the strength of his character. And as Attorney General Jackson said:

> Even more than by his judgments this man imparted strength to the Court during our time by his character. He presided over the Court through the most critical of its hours since the Civil War . . .
>
> It was fortunate that the chief of the justices at such a time was one whose established position in public opinion gave the country a sense of steadiness, in spite of rapid movement, and an assurance that he was leading in the direction of amendment of doctrine rather than toward destruction of institutions. The Chief Justice was himself a symbol of stability as well as of progress.

How accurately the words of the Chief Justice himself (taken again from his address in Westminster Hall) foretold the observation of the Attorney General:

> We have provided the constitutional guaranty that no one shall be deprived of life, liberty or property without due process of law. But this did not confine practice to archaic forms or deny the opportunity of improvement.
>
> It did not refuse to legislatures the authority to enact reasonable measures to promote the safety, health, morals, and welfare of the people, or make rational experimentation impossible, but it was intended to preserve and enforce the primary and fundamental conceptions of justice which demand notice and opportunity to be heard before a competent tribunal in advance of condemnation, and with respect to every department of government, freedom from arbitrariness.
>
> It is no occasion for despair if men disagree as to the application of these principles from time to time. Such differences will in time be dissolved by devotion to fundamentals.



Underwood & Underwood

CHARLES EVANS HUGHES

Chief Justice Hughes was unquestionably one of the great men of our time. His intellectual gifts were almost unparalleled among his contemporaries. As must be inevitable in the case of every man who exercises great power in stormy times there are those who question the wisdom of some of his acts. He was and still is criticized for leaving the bench to run for political office and for returning to it after an unsuccessful campaign. Then too he was and is charged with deserting legal principle in riding out the storm created by President Roosevelt's court-packing proposal which he so vigorously opposed.

We are too close to the events to appraise the man. If he made mistakes they were the mistakes of a statesman. Many assert that the course of world history might have been altered for the better if his excursion from the bench had resulted in his election to the Presidency. While it is unquestionably true that the Supreme Court, under his leadership, bent to the storm when it, to all intents and purposes, reversed the *Schechter* case (295 U. S. 495) in the *Jones & Laughlin* case (301 U. S. 1), that reversal may have been a major factor in the defeat of the Court-packing plan.

Though his strong bearded face seemed to many as impassive as that of the marble figure that looked down from above him in the Supreme Court chamber with such striking resemblance, he was not a mere cold embodiment of justice but a living, acting and fighting man of his times.

15

Association's Gold Medal:

Chief Justice Vanderbilt Receives 1948 Award

■ Twenty years after our Association's establishment at its Seattle Annual Meeting in 1928 of the awarding of its Gold Medal for "conspicuous services to American jurisprudence", Chief Justice Arthur T. Vanderbilt, of the New Jersey Supreme Court and head of his State's judicial system which he has reorganized and greatly improved under the Constitution adopted by the voters of the State last November, received the coveted award for 1948—the highest honor which the American Bar bestows upon one of its members. The presentation took place on September 9 at the Annual Dinner, held in the great Civic Auditorium in Seattle, and it attested the abundant admiration, the affection and the high respect in which the recipient is held by those who have worked with him in many projects for improving the administration of justice and the standards of the profession.

■ In presenting the award to Chief Justice Vanderbilt, who was President of our Association in 1937-38 and on September 1 became Dean Emeritus of the New York University Law School, President Gregory spoke for the Board of Governors which voted the bestowal and for the whole membership of our Association which will applaud it:

"Twenty years ago, here in Seattle, the American Bar Association made provision for the awarding of the American Bar Association Medal each year to a member of the Bar in the United States for 'conspicuous service to the cause of American jurisprudence'. Many distinguished lawyers have been the recipients of this award, but none more brilliant or more deserving than the man upon whom it is my privilege to bestow this Medal tonight.

"I present to you ARTHUR T. VANDERBILT:

"Lawyer, judge, educator, statesman, apostle of good government and the orderly administration of justice; a powerful, moving force for judicial and legislative reform; leader of the Bar of the nation during his thirty-five years of active general practice; Dean of the Law School of New York University; builder of a great Law Center; founder of a Clearing House to foster study and understanding of the duties of citizenship and to encourage participation in public affairs; energetic supporter of Judicial Councils and their work; tireless and farsighted artisan in constitutional revision when the need is apparent in the interest of good government; active participant, by appointment of the War Department, in reform of military justice; in the forefront among those selected by the Attorney General to collaborate with others in the creation of the Administrative Office of the United States Courts; head of the Advisory Committee appointed by the United States Supreme Court to draft Rules of Criminal Procedure for the federal Courts; architect of the new judicial structure and Rules of Court in New Jersey; Chief Justice-Designate of that great State; and former President of the American Bar Association.

"In all these activities, in all these high offices, he has brought to bear the highest order of intellect and discharged his manifold duties with conscientious devotion; always inspired by those magnificent qualities of heart and mind which brought him to his present position of leadership and qualified him to render distinguished and conspicuous service to his profession, to his fellow man and to the cause of American jurisprudence.

Here is a list of the recipients of the American Bar Association Medal:

1929—Samuel Williston
1930—Elihu Root*
1931—Oliver Wendell Holmes*
1932—John Henry Wigmore*
1934—George W. Wickersham*
1938—Herbert Harley
1939—Edgar Bronson Tolman*
1940—Roscoe Pound
1941—George Wharton Pepper
1942—Charles Evans Hughes*
1943—John J. Parker
1944—Hatton W. Sumners
1946—Carl McFarland
1947—William L. Ransom
1948—Arthur T. Vanderbilt

* Deceased

"Judge Vanderbilt, in the name of the American Bar Association and by authority of its Board of Governors, in earnest of our esteem and admiration, I have the honor to present to you the Association's highest award, the American Bar Association Medal."

The Recipient Responds with a Portrayal of the Bar's Progress

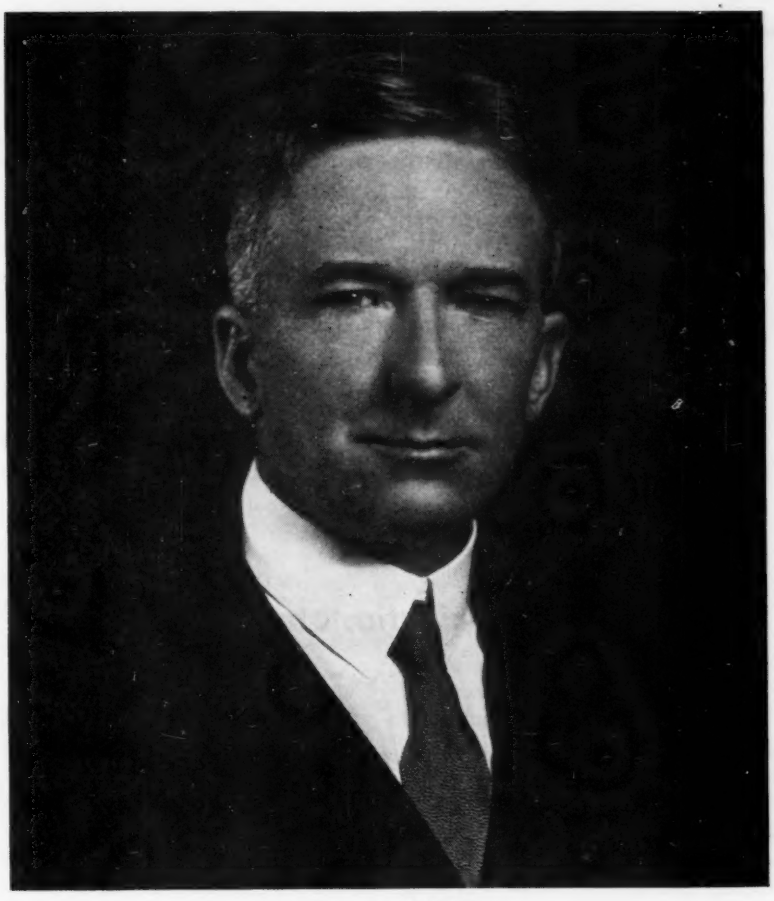
Chief Justice Vanderbilt was warmly greeted by the audience of his friends and admirers. He then responded as follows:

"Mr. President: May I express to you and through you to the Board of Governors my deep sense of appreciation of the honor which you have conferred upon me.

"The American Bar Association has meant much to me. First of all, I would mention friendships engendered in this Association. There was a time when I thought there was nothing quite like college friendships. They are in a sense unique; they are timeless, and start where you leave off, even after a great many years; time and circumstances and position make no difference in them.

"But even greater are the friendships which are born of men working shoulder-to-shoulder in some great cause, especially when the men have common attributes of training and capacity and interests. And what cause could be greater for a lawyer than the cause of improving justice in the work of our Courts, our traditional Courts and our newer administrative tribunals? Or upholding the legal education of the oncoming generation on whom we in a democracy in times such as these must depend so much?

"I owe a great deal to the Association, too, for lifting me for a year away from the trial of cases and the argument of appeals and teaching of law and the running of political campaigns, to roam around the United States and see what the Bar of this country was doing (I covered over 70,000 miles within a year), and to preach to the Bar the necessity of our regaining our old leadership in the formulation of public opinion. It is a postgraduate education that has no equal anywhere in the world and if a man can stand its rigor, it is an experience that he will long remember.



ARTHUR T. VANDERBILT

The Bar Has Made Great Headway Since 1928 and 1938

"I would like to leave something with you that will show my appreciation of this Medal. These are troublous days, as everybody tell us. The future is clouded. Yet it may do us all some good to know the advances which the Bar has made in the mere period of ten years.

"In 1938 we sent out three questionnaires. One inquired of the Bar Associations of the country about their activities. I am not going to give you statistics, but just two or three examples. One Bar Association president reported that they had not been able to hold a meeting for four years because the secretary had got himself a New Deal job in Washington and had taken the minute book with him [laughter], and how could they hold a meeting without the secretary and the minute book?

"Another Association reported solemnly that it had but one committee, and that was the Committee on the Annual Picnic. The third Association reported that they had thirty-eight outstanding committees with, unfortunately, but thirty-four members. You can see the advance which has been made, the country over, in the last ten years.

"And we inquired, too, as to what had been done over the preceding ten years, from 1928 to 1938, to improve the administration of justice in the several States. One great State reported that after five years of earnest endeavor they had persuaded the judges of their Supreme Court to wear black gowns in Court—their

only accomplishment. And many States had still less to report.

Improving the Executive and Legislative Departments of States

"The other question asked was: What have you done to improve the administration of the executive and legislative departments of your State governments? And the answer, all over the country, summed up to one grand round zero: No State Bar, no local Bar Association, in the country, in the period between 1928 and 1938, conceived of itself as having the slightest responsibility for the processes whereby legislation is made or for the entire administrative process, not to mention the ordinary functions of the executive.

"Now, when you turn and contrast that situation with the manifold activities of the American Bar Association as witnessed by our annual program in such a profusion that no one can possibly hope to know more than a tenth of what is going on in an Annual Meeting, and where our greatest need seems to be a handbook distributed rapidly after the meeting to tell us the things that we should have covered during the very delightful week that we have had here in Seattle—and I cannot help but mention its unrivaled hospitality; I have never known anything like it at any of our Bar Association meetings—we are aware of great advances which have been made.

"So while the future is disturbing, I think we can definitely report to the profession the tremendous strides which have been made in the past decade and which are in evidence and an earnest of what our profession can and will do to meet the crises that are bound to arise in the future.

"Again, Mr. President, let me thank you and the Board of Governors from my heart!"

Stultiloquia et Sapientia, or the Secrets of "Conference" Success

■ All Conferences[1] are "successful", just as all brides are blushing and beautiful, all politicians great statesmen, and all lawyers "learned". But there are "degrees" in Conferences as in other things; and the observance of some simple rules, if they cannot guarantee, at least will tend to promote, success.

I do not now speak of the *manners* which participants in congresses should show towards their colleagues. To pontificate on such a matter would be as insolent as it is, for the present purpose at any rate, unnecessary. Congressists will be tolerant, open-minded, unprejudiced, forgiving, friendly, as a matter of course. If lenience is withheld at all it will never be because of racial, historical, national, religious, or strange-customary antagonisms, but only because discourses are too long, or too dull; or chairmen too tender; or interrupters too persistent. Now for the rules. These concern the matter and form of interventions or speeches.

Firstly, the queen of virtue is brevity. If a lawyer cannot make his points clearly and succinctly in ten minutes (unless, perhaps, he is expounding or opening a difficult subject), then he should go back and do some more pleadings for practice. Shortness is the first need. It is better to finish with your audience saying "Why didn't he go on?" than saying "Why didn't he stop before?" You cannot say all that is to be said. This is not a pig-trough. Leave something for the others. And select, eliminate, rather than exhaust. If you try to exhaust your subject, you are sure to exhaust your audience.

Secondly, attractiveness. A jest, an anecdote, a quotation (always verified, with source given), an illustration is always needed to sweeten the most profound allocution.

It is a pity that all public speakers should not have had experience of street corner oratory. Even without the extreme and base correctives of rotten eggs or ripe tomatoes, if you stand on a soap-box to put forward the merits of some patent medicine, religious truth, or political panacea, you must *keep your audience.* For self-respect, if not for gain. Conferences are too polite, and speakers at Conferences habitually trespass upon the good manners of their hearers. This is because they lack the open-air training, and are accustomed to the procedures of Courts (where the audience has to stay because of interest or compulsion of police), or to the procedures of the drama (where the audience is loath to forego the money it has paid), or to the procedures of the professor's lecture-hall (where unhappy youth is constrained to remain by some hope of gain or fear of loss).

Let every speaker at a Conference speak in awe of a retreating audience—there should be a buffet outside the doors of all Conference halls—and he will be lively, reminiscent, and above all concise. The kings in ancient time had jesters at court lest they should take themselves too seriously. Modern potentates have dire need of those high officers. It is a tragic omission from the United Nations Organization. And all who seek to lead others to a useful conclusion must seek to check themselves similarly, as far as their natures permit.

A last word, if the other fellow has taken your pet point, say you agree with his superb wisdom, which so closely, if unexpectedly, matches your own; or hold your peace in silent and astonished admiration; *but don't say it all over again.*

By W. Harvey Moore,
Secretary of the International Law Association

1. Although this sapient statement was written from the point of view of experience in international organizations and their conferences, much or all of it is pertinent to Bar Association meetings and speakers in the United States.

16

Judicial Powers:

Their Exercise Without Constitutional Safeguards

by **Charles C. Simons** • Circuit Judge, United States Court of Appeals for Sixth Circuit

■ Here is an important article which should be brought to the personal attention of every member of the United States Senate and House of Representatives and should be studied by the members and staff of the Hoover Commission on the Reorganization of the Federal Government, by all who are considering improvements in State administrative law, and by judges, practicing lawyers, and law teachers generally. Under the title of "The Constitutional Grant of Judicial Power", it was presented by Judge Simons before the 1948 Judicial Conference for the Sixth Circuit. Through his clear and very timely analysis of the constitutional provisions respecting the judiciary and the Supreme Court's labyrinthian interpretation of them, the experienced jurist seems to us to sustain in this paper what our Association and the *Journal* have long been reiterating as to the selection and tenure of judges, as to the safeguards which should surround the exercise of judicial functions by those who are not judges of constitutional Courts, and as to the need for plenary judicial review of such exercise of powers. The revelation that momentous quasi-judicial powers of weighing evidence, finding facts, interpreting laws, deciding policies, and in effect inflicting penalties and punishments that vitally affect the lives of enterprises and individuals are entrusted to officials who are politically dependent and are selected for reasons which would lead a judge of a constitutional Court to disqualify himself from sitting, should give powerful support to the avowed intent and purpose of the Administrative Procedure Act to assure an adequate review of agency decisions (see Senator McCarran's "Improving 'Administrative Justice': Hearings and Evidence; Scope of Judicial Review", 32 A.B.A.J. 827; December, 1946).

■ Upon a number of occasions I have observed that many if not most of the great controversies that vitally affect the social and economic interests of the American people are no longer determined by the exercise of the constitutional grant of judicial power, but are in a realistic sense decided with finality by administrative boards and commissions, the personnel of which is not secured against political, economic and geographical influences by the safeguards which the constitutional grant throws about judges to insure the independent judgment of the Courts upon which they sit. I propose to examine, as briefly as I may, how this exercise of judicial power by other than constitutionally created judges came to be rationalized. I do not propose to consider the wisdom of the process or to suggest doubt of its validity.

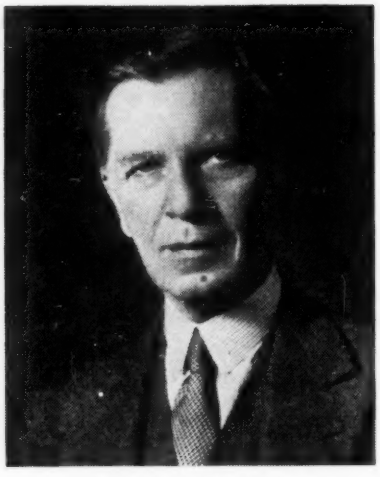
The judicial power is conferred upon the United States by Article III of the Constitution, to be vested in one Supreme Court and such "inferior Courts" as the Congress may, from time to time, ordain and establish; and the judges of both the Supreme and "inferior Courts" are declared to hold their offices during good behavior and to receive compensation which shall not be diminished during their continuance in office. By Paragraph 2 of that Article the judicial power is declared to extend to all cases in law and equity arising under the Constitution, laws and treaties of the United States, to specific classes of controversies clearly recognizable as national in their import, and also to private controversies between citizens of different States.

Of the constitutional scheme for distributing the powers of government, the Supreme Court has pointed out that its object is basic and vital. As to the importance of an independent judiciary, Chief Justice Marshall, in the debates before the Virginia State Convention, observed:

> The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?

And Hamilton observed in *The Federalist* that

> The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will.



CHARLES C. SIMONS

Origins of Public Respect and Confidence in the Federal Courts

As a result of the method by which judges are selected, their security of tenure, the safeguarding of their compensation from control by legislative or executive authority, the precise limitation on the extent of judicial power and the possibility of removing private causes from the possible corroding influence of local bias, there developed a federal judiciary which commanded the respect and confidence of the American people in its independence, firmness and fairness, and received the plaudits of all intelligent foreign commentators who examined with care the American constitutional system.

The judges, freed from the need for and conceding the impropriety of participation in partisan politics, made independent of other departments of government and the temptation to yield to local pressures, came to occupy in the minds of the people an exalted status and to constitute truly what Dean Wigmore once called the "Priesthood of Justice".

I well remember that when, as a student or as a novitiate at the Bar, I entered the portals of the federal Courts, it was with the feeling that here was a holy place; and the veneration that possessed me seemed to be mirrored in all of those with whom I was surrounded and in the manner of address by counsel to the Court and in their restraint in examination of jurors and witnesses. It is true, of course, that when there was thrown upon the federal Courts the duty of enforcing the national prohibition law and the numerous statutes creating new and sometimes petty criminal offenses, a good deal of the aura of sanctity which surrounded the Court began to dissolve, and this notwithstanding the earnest efforts of judges to preserve it. I venture to say, however, that respect for federal law as administered by federal Courts to a large degree still remains in the minds and hearts of the American people, and that this is mainly due to the constitutional provisions governing appointment of judges and insuring their independence from extraneous influences.

Cases Are Determined by Officials Who Would Be Disqualified If Judges

The first impression that naturally arises in respect to the grant of judicial power is that it is all-inclusive and exclusive; and yet, as we view the current scene, we note that great and vital controversies upon which the judicial power may appropriately be exercised, are determined by officials whose tenure is limited, whose compensation is within the control of the Congress, who usually are not even designated as judges and who in many cases are deliberately chosen for their experience, predilection and commitments, which, if possessed by a judge, would lead him to disqualify himself or result in his involuntary disqualification.

Nature and Extent of Constitutional Grant of Judicial Power

The question as to the nature and extent of the judicial power conferred by the Constitution arose early in respect to Territorial Courts, and the first pronouncement on the subject came in *American Insurance Co.* v. *Canter*, 1 Pet. 511. There it was reasoned that such Courts are not constitutional Courts, upon which the judicial power conferred by the Constitution on the general government could be deposited, because they are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States, so that their jurisdiction is no part of the judicial power conferred by Article III of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States.

A like view was subsequently taken of the status and jurisdiction of the Courts for the District of Columbia, whose powers were said to have been created in virtue of the power of Congress to exercise exclusive legislation over the District which had been made the seat of government. Such Courts were therefore empowered to give advisory decisions, because their jurisdiction was not limited to cases or controversies

Concerning the Author: Charles Caspar Simons was born in Detroit in 1876, and was graduated from the University of Michigan in 1898 and from its Law School in 1900. He then began the practice of law in Detroit, was a member of the State Senate in 1903-04, a Circuit Court Commissioner in Wayne County in 1905-06, a member of the State Constitutional Convention in 1908, and a presidential elector for Charles Evans Huges in 1916. Appointed to the United States District Court for the Eastern District of Michigan in 1923, he served in that Court until February of 1932, when he was elevated to the Circuit Court of Appeals for the Sixth Circuit. He has been a member of our Association since 1924 and is a member of the Michigan State Bar, the Detroit Bar Association and the American Judicature Society. He has been an enthusiastic golfer and member of the Association of Golf Club Presidents. He was a member of the Board of Governors of the Hebrew Union College in Cincinnati, and is a member of the executive committee of the American Jewish Committee.

within the meaning of Article III, but were merely in aid of legislative or executive action. The United States Court for China and the Consular Courts were also held to be legislative Courts created as a means for carrying into effect the constitutional powers respecting treaties and commerce with foreign nations. And it had also been held that legislative Courts could be created as special tribunals to examine and determine various matters arising between the government and others, which from their nature do not require judicial determination even though susceptible of it; that the mode of determining matters of this class is completely within the Congressional control; that Congress might reserve to itself the power to decide them, delegate that power to executive officers, or commit it to judicial tribunals.

Judicial Powers Exercised by Boards and Commission Without Review

It was not until 1929, as far as I have been able to discover, that the constitutional grant of judicial power came into question in respect to the status of a tribunal having attributes and historical development similar to boards and commissions now exercising judicial power. It was in relation to the right of review by the Court of Customs Appeals over decisions of the Customs Court. The case was *Ex parte Bakelite Corporation,* 270 U. S. 438. There the distinction between constitutional Courts and legislative Courts was exhaustively discussed. It had been argued that the Court of Customs Appeals is an "inferior Court" created under Article III and so could possess no jurisdiction of a proceeding that was not a case or controversy, especially as the statute of its creation was silent as to the tenure of its judges.

The Supreme Court, however, pointed out that the Customs Court had formerly been the Board of General Appraisers; that the provisions of the customs law requiring duties to be turned into the Treasury involved protests susceptible of determination by executive officers; that final determination had at times been confided to the Secretary of the Treasury with no recourse to judicial proceedings; and that insofar as its decisions might in certain cases be judicial, the Court derived its powers, not from the constitutional grant of judicial authority, but from the power implied in other grants of federal authority. The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports—a power that necessarily includes power to adopt any appropriate means of carrying it into execution. Its jurisdiction of appeals from the Board of General Appraisers included nothing which inherently or necessarily required judicial determination but only those matters, the determination of which may be, and at times has been, committed exclusively to executive officers.

Constitutional Status of Courts of the District of Columbia

In arriving at its decision, however, the Court, in argument that is undoubtedly *dicta,* characterized the Courts of the District of Columbia, including the District Court and the Court of Appeals of the District, as legislative and not as constitutional Courts. And this was thought to be their status until 1933, when the Supreme Court decided *O'Donoghue* v. *U. S.,* 289 U. S. 516. You may remember that the first impact of the New Deal upon appropriations was in the interest of economy rather than of expenditures, and the *O'Donoghue* case involved a statute, the effect of which, if validated, would have reduced the salaries of the judges of the Court of Claims, the District Court of the District of Columbia, and the Court of Appeals of the District of Columbia, based upon the assumption that those Courts were legislative Courts, with the compensation of their judges within the control of Congress.

The Supreme Court, however, held that while, by the clause giving plenary power of legislation over the District, Congress was enabled to confer upon such Courts jurisdiction in addition to the federal jurisdiction which Courts exercise under Article III, yet they are notwithstanding recipients of the judicial power of the United States under that Article and are constituted in virtue of it. One of the grounds for distinguishing between the Courts of the District of Columbia and the Territorial Courts is that the former were impermanent while the Courts of the federal District were not subject to that infirmity. The Court rejected what was said about such Courts in the *Bakelite* case as having been pure *dicta,* declared the District Court and the Court of Appeals of the District to be constitutional Courts, with the judges holding offices during good behavior and with compensation that may not be diminished—a decision from which, by the way, Chief Justice Hughes, Justice Van Devanter and Justice Cardozo dissented.

Judicial Power of Court of Claims Not Derived from Constitution

On the same day, however, the Court announced *Williams* v. *U. S.,* 289 U. S. 560, holding that the judicial power of the Court of Claims is not vested in virtue of Article III of the Constitution so as to bring its judges within the protection of that Article as to tenure and compensation. The argument ran that the Court of Claims was originally an administrative or advisory body, and since all matters cognizable by it are equally susceptible of executive or legislative determination, they are matters in respect to which there is no constitutional right to a judicial remedy, and authority to inquire into and decide them may constitutionally be conferred on a non-judicial officer or body.

In arriving at this conclusion the Court found some difficulty. It was compelled, in order to justify its own right to consider appeals from the Court of Claims, to concede that the latter exercised judicial power,

(Continued on page 977)

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THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • **Editor-in-Charge**

The Revised Draft of An International Declaration on Human Rights

■ The Declaration on Human Rights which has been discussed several times in this department (34 A.B.A.J. 202, 205, 260, March, 1948; 34 A.B.A.J. 277, April, 1948; 34 A.B.A.J. 349, May, 1948; 34 A.B.A.J. 475, 480, June, 1948) has moved a further step toward consideration and possible approval. A new draft prepared by a Drafting Committee at Lake Success in May was thoroughly revised by the full Commission on Human Rights at its Geneva sessions, May 24-June 18. This revised draft was approved in the Commission by twelve votes for and none against, with four abstentions (the Soviet Union and three Eastern European countries). When the revised draft came before the Economic and Social Council, the latter sent it to the General Assembly without discussion or recommendation, due to a persistent filibuster by the Soviet bloc on other items on the agenda. The texts before the Assembly now in session in Paris are: The main revised draft and the Soviet dissent accompanied by proposals for revision. The September action of the House of Delegates of our Association, and the August action of the Canadian Bar Association, as to the Draft Declaration, are reported on page 881 of this issue.

The official text of the revised draft of the Declaration on Human Rights as now pending follows; lawyers should read it carefully and form and express their own opinions about it without delay.

PREAMBLE

WHEREAS recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; and

WHEREAS disregard and contempt for human rights resulted, before and during the second world war, in barbarous acts which outraged the conscience of mankind and made it apparent that the fundamental freedoms were one of the supreme issues of the conflict; and

WHEREAS it is essential, if mankind is not to be compelled as a last resort to rebel against tyranny and oppression, that human rights should be protected by a regime of law; and

WHEREAS the peoples of the United Nations have in the Charter determined to reaffirm faith in fundamental human rights and in the dignity and worth of the human person and to promote social progress and better standards of life in larger freedom; and

WHEREAS Member States have pledged themselves to achieve, in co-operation with the Organization, the promotion of universal respect for and observance of human rights and fundamental freedoms; and

WHEREAS a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now therefore the General Assembly

PROCLAIMS this Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

ARTICLE 1

All human beings are born free and equal in dignity and rights. They are endowed by nature with reason and conscience, and should act towards one another in a spirit of brotherhood.

ARTICLE 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, property or other status, or national or social origin.

ARTICLE 3

Everyone has the right to life, liberty and security of person.

ARTICLE 4

1. No one shall be held in slavery or involuntary servitude.

2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ARTICLE 5

Everyone has the right to recognition everywhere as a person before the law.

ARTICLE 6

All are equal before the law and are entitled without any discrimination to equal protection of the law against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ARTICLE 7

No one shall be subjected to arbitrary arrest or detention.

ARTICLE 8

In the determination of his rights and obligations and of any criminal charge against him, everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal.

ARTICLE 9

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed.

ARTICLE 10

No one shall be subjected to unreasonable interference with his privacy, family, home, correspondence or reputation.

ARTICLE 11

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own.

ARTICLE 12

1. Everyone has the right to seek and be granted, in other countries, asylum from persecution.

2. Persecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations do not constitute persecution.

ARTICLE 13

No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality.

ARTICLE 14

1. Men and women of full age have the right to marry and to found a family

and are entitled to equal rights as to marriage.

2. Marriage shall be entered into only with the full consent of both intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection.

ARTICLE 15

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

ARTICLE 16

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

ARTICLE 17

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

ARTICLE 18

Everyone has the right to freedom of assembly and association.

ARTICLE 19

1. Everyone has the right to take part in the government of his country, directly or through his freely chosen representatives.

2. Everyone has the right of access to public employment in his country.

3. Everyone has the right to a government which conforms to the will of the people.

ARTICLE 20

Everyone, as a member of society, has the right to social security and is entitled to the realization, through national effort and international co-operation, and in accordance with the organization and resources of each State, of the economic, social and cultural rights set out below.

ARTICLE 21

1. Everyone has the right to work, to just and favorable conditions of work and pay and to protection against unemployment.

2. Everyone has the right to equal pay for equal work.

3. Everyone is free to form and to join trade unions for the protection of his interests.

ARTICLE 22

1. Everyone has the right to a standard of living, including food, clothing, housing and medical care, and to social services, adequate for the health and well-being of himself and his family and to security in the event of unemployment, sickness, disability, old age or other lack of livelihood in circumstances beyond his control.

2. Mother and child have the right to special care and assistance.

ARTICLE 23

1. Everyone has the right to education. Elementary and fundamental education shall be free and compulsory and there shall be equal access on the basis of merit to higher education.

2. Education shall be directed to the full development of the human personality, to strengthening respect for human rights an fundamental freedoms and to combating the spirit of intolerance and hatred against other nations and against racial and religious groups everywhere.

ARTICLE 24

Everyone has the right to rest and leisure.

ARTICLE 25

Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement.

ARTICLE 26

Everyone is entitled to a good social and international order in which the rights and freedoms set out in this Declaration can be fully realized.

ARTICLE 27

1. Everyone has duties to the community which enables him freely to develop his personality.

2. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, public order and general welfare in a democratic society.

ARTICLE 28

Nothing in this Declaration shall imply the recognition of the right of any State or person to engage in any activity aimed at the destruction of any of the rights and freedoms prescribed herein.

Grounds Stated for Soviet Dissent from the Revision

The Soviet dissent draws special attention to the following as "specific serious omissions and shortcomings":

(a) The ignoring of such a fundamental requisite of democracy as the struggle against Fascism and Nazism, against the activities of Fascist and Nazi elements and their abuse of democratic rights and freedoms and against the danger of the expansion, retention and resurgence of Fascist regimes; and, in particular, the failure to prohibit Fascist and Nazi propaganda and to enforce responsibility for such propaganda;

(b) The failure to enlarge the democratic rights and freedoms of the peoples and to defend some of the most important democratic principles in the Declaration; the omission from the Declaration (except for one paragraph in Article 27) of any mention even of democracy and the actual concepts of "the democratic state", "democratic principles", etc.

(c) The limitation and restriction of a number of democratic rights and freedoms in the Declaration as compared with the Geneva draft; the refusal to maintain consistently the principle of full equality for all, without distinction as to race, nationality, social position, religion, sex and language; the omission from the Declaration of the provision regarding the right of every person to his own national culture, to be taught in school in his native language and to use that language in the press, at meetings, in courts and other public offices; the failure to wage a serious fight against racialism and discrimination, to prohibit the propaganda of racial and national hostility, and to lay down the principle that such propaganda should be punishable.

(d) The failure, in most of the articles of the Declaration, to refer to ensuring and guaranteeing the implementation of rights and freedoms and to concrete forms, means and methods of applying the provisions of the Declaration; the unrealistic, formal and legal nature of the Declaration (especially Articles 21, 22, 24 and 25, relating to economic and cultural rights).

(e) The failure to include in the Declaration any concrete obligations whatsoever on the part of the individual towards his native land, the people to which he belongs and the State; the direct ignoring in the case of several serious questions (freedom of information, freedom of transit) of these obligations, on the one hand and on the other hand, of the rights and sovereignty of States, and of the relevant provisions of the United Nations Charter concerning non-interference in the domestic affairs of States Members.

The Soviet delegation is certain that, instead of this weak and, in many ways, absolutely unsatisfactory Declaration, a Declaration will eventually be drawn up which will effectively serve the cause of historical progress, democracy, lead to a real improvement in the lives of millions of simple people throughout the world, as well as serve the aims of the fight against the danger of a recrudescence of Fascism and Nazism and, which will finally lead to an assertion

of the principles of equality of nations, real respect for human rights and freedoms and the strengthening of international peace.

The Soviet delegation attached to the above statement, for inclusion in the Commission's report, a list also of the main proposals and amendments to articles of the Declaration which were submitted by the Soviet delegation but which were not adopted by the Commission. The statement added that a perusal of the list will in itself serve largely to explain why the Soviet delegation abstained from voting on the Draft Declaration as a whole.

18

Department of Legislation

Harry W. Jones, Editor-in-Charge

The Modern Congressman: Legislator or Constituent Care-Taker?

■ The legislative duties of a United States Senator or Representative in Congress constitute a full-time job. The burden of law-making business grows heavier every session, and the proposals on which the Congressman must record his best judgment are increasingly more complex and more demanding of intensive study. The committee work which has first call on a Congressman's attention is invariably time-consuming and difficult in its technical requirements. As a representative legislator, the Congressman must have a working familiarity with all pending measures of particular concern to his State or district. Lawyers who have worked as draftsmen or technical consultants for federal or State legislative committees know how hard it is to acquire an effective grasp of the problems involved in even a single major statutory proposal. Compare the plight of a conscientious Congressman who is setting out to do the best he can as a committee member, regional spokesman, and national policy-maker.

Members of Congress, on the average, work longer hours than any other occupational group. The time most Congressmen give to their duties might be sufficient for very respectable coverage of the principal legislative issues of a Congressional session, if Congressmen were able to devote their full energies to the great function of federal law-making. But a political convention has grown up in this country that a member of Congress is only a part time lawmaker, who must simultaneously be available for service as a Washington handyman for such of his constituents as have dealings with the Executive departments and agencies of the federal government. Every first-term Congressman discovers, before he has been six months in Washington, that his best intentions to keep up with his legislative work-load are hopelessly frustrated by the pressures of constituent care-taking.

No technical advance in Congressional reorganization could do as much to improve Congressional consideration of legislative issues as would be accomplished by correction of the widespread notion that a Congressman owes it to his constituents to maintain his office as a combined appointment and employment bureau, parity and pension collection agency, and legal aid clinic. A good Congressman's time is too valuable to the country to be taken up with distractions like service as intermediary between a federal regulatory agency and some influential constituent. Even a bad Congressman might very possibly do better if allowed to give full time to his proper legislative job. It is a shocking thought that a responsible member of Congress may be so busy helping his constituents with their personal Washington difficulties that he is able to give only "once-over-lightly" attention to legislation of great national and international significance.

It would be over-stating the case to say that the Congressional errand-running tradition is wholly a vicious one. Favor-requesting calls and letters keep a Congressman in some personal touch with his constituents and give him a cross-section, although not a very representative one, of the impact of federal regulatory legislation on the day-to-day business life of his State or district. But the price which must be paid for this "humanization" of the governmental process is entirely too high. Most Congressmen have more truly legislative correspondence than they can handle, and communications urging a Congressman to intervene in essentially administrative matters are not likely to contain information of general legislative usefulness. Certainly there is nothing to be said for constituent care-taking which would justify the existing drain on Congressional time and attention.

The members of the LaFollette-Monroney Joint Committee on the Organization of Congress were fully aware of the burden which errand-running imposes on a Congressman sincerely desirous of doing a good legislative job. The Joint Committee's principal recommendation in this connection was that each Senator and Representative be authorized to employ a "high caliber" administrative assistant at an $8000 annual salary, "to assume non-legislative duties now interfering with the

proper study and consideration of national legislation". This recommendation has since been made effective on the Senate side, and the House will inevitably have to adopt the same assistance for its individual members. The provision of competent administrative assistants will be of considerable help, but it is nothing like a complete solution of the problem. Too many constituents will still make the familiar demand that their Congressional addressees "give this matter your personal attention". And no individual Congressman can refuse to concern himself with constituent chores while his colleagues in the Senate and House maintain the status of part-time legislators and part-time Washington business agents.

What practical steps can be taken to prevent the diversion of Congressional energies into non-legislative channels? A distinguished former member of the House leadership has proposed that the number of Congressional districts be cut in half and that each new district elect two representatives, one to function exclusively as a federal law-maker and the other to act exclusively as an agent of the district's citizens in their dealings with Executive departments in Washington. A more likely suggestion comes from the former staff director of the Joint Committee on the Organization of Congress, who has urged that Congress promulgate a "Charter of Congressional Freedom" in the form of a concurrent resolution disqualifying members of Congress from intervening with Executive agencies in the personal affairs of constituents. Any such internal regulation of Congressional behavior will have hard sledding politically. There will always be certain Congressmen for whom constituent caretaking is the only road to re-election. The experience of Congress with the grossly unfair "Bundles for Congressmen" campaign a few years ago has made many Senators and Representatives slow to support legislation which might be misrepresented as Congressional work-dodging.

Pending some forthright direct attack on the errand-running problem, there is urgent need for greater restraint on the part of lawyers and other responsible citizens in soliciting the personal intervention of members of Congress in administrative and other non-legislative matters. The Bar has the greatest stake in the quality of American legislation and should assume leadership in a nonpartisan effort to make clear to the electorate that a Congressman up for re-election should be judged on the basis of his total legislative performance and not in terms of the usefulness of his office for the personal business of a few constituents.

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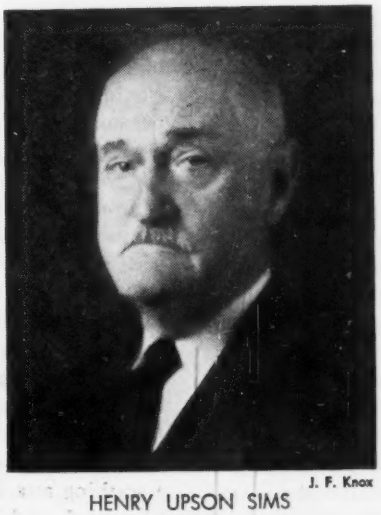

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *Seattle and Washington State—1948*

This issue is devoted considerably to reporting some of the principal events, actions voted, and addresses delivered, at our Association's 71st Annual Meeting. Proceedings of the Assembly and the House of Delegates will be more fully chronicled in our November issue.

Among the notable addresses which, for reasons of time and space, were held for publication in our November number are those of Leonard W. Brockington, C.M.G. K.C., LL.D., of Ottawa., Canada; John T. Hackett, K. C., M. P., of Montreal, Canada; Majority Leader Charles A. Halleck, of Indiana and the United States House of Representatives; Senator Pat McCarran, of Nevada and the Senate Committee on the Judiciary; and Professor George T. Washington, Assistant Solicitor General of the United States. Our readers will await them with great interest.

It was an unforgettable meeting. Its program was replete with many-sided interest, and its spirit was dynamic and full of patriotic purpose. The public interest was kept in first place. Several projects important for our profession and our country were launched, as is reported in news columns of this issue; other work which has been under way was given added impetus and the guidance of new planning.

The hospitality of our hosts in Seattle and Washington State has not been excelled in our Association's history. Everything had been well planned and was well done, in a spirit of the utmost friendliness and thoughtfulness. Even an attendance far beyond expectations could not throw the admirable plans awry.

The convocation climaxed and closed a sound and successful Association year, under the diligent administration of President Tappan Gregory. It ushered in a new year that already is beset with grave issues, toward the solution of which our Association will strive to make informed contributions, under the stalwart leadership of President Frank E. Holman.

■ *Can Inflation Be Stopped by Law and Regulations?*

For a long time we have been reading statements by economists and others that there are ways by which to control economic inflation and depression by fiscal and taxation policies and practices in the form of statutes and regulations. We have known that the profession of law especially and the public generally have found the enforcement of direct price controls impracticable and also injurious in that the attempt to enforce fixed prices has occasioned other gross evils. The editors of the JOURNAL therefore began a search for someone who, detached from political and special interests, is competent to give our readers, in terms of law and legal administration, a scientific discussion of perhaps our more serious and urgent economic problem. In almost every issue we have called attention to its gravity, for members of our profession, for the younger men and women especially, and for all our people.

On the constructive side, the *Virginia Quarterly Review* published in its Summer number a clear, challenging and interesting presentation of the possibilities. The author is a member of our own profession and a Professor of Law at Yale University. His discussion appeared under the forthright title: "Can Inflation Be Stopped?"

We promptly wrote to Dean Sturges, who is a member of our Advisory Board, to ask Professor Rostow if he would not prepare a paper for the JOURNAL—an original presentation with emphasis on points of interest to lawyers, perhaps a synopsis for our readers of his *Virginia Quarterly Review* article. Dean Sturges put us in contact with Professor Rostow, who was spending his vacation in Vermont. While we were in correspondence with Mr. Rostow, the *United States News* of August 27 deemed the *Virginia Quarterly Review* article to be worth reprinting in full, with significant editorial comment by its editor, David Lawrence.

An interesting sidelight is that when Professor Rostow and associates wrote and published *A National Policy for the Oil Industry* (Yale University Press, 1948), Editor Lawrence in his syndicated column made a scathing attack upon the book, the policies which it advocated, and the circumstances under which it was

written at Yale University. Although disagreeing with much of the book, the JOURNAL's review by its Editor-in-Chief (34 A.B.A.J. 230 and 405; March and May, 1948) staunchly defended the preparation of the book as a contribution to its subject and within tolerable limits of academic freedom.

Editor Lawrence evidently thinks much better of Professor Rostow in view of the *Virginia Quarterly Review* exposition. Concerning his reprinting of it Mr. Lawrence open-mindedly said:

> The article on these and the succeeding eight pages is presented because it is a significant analysis of inflation and its effects—well worth reading because it is so clear-cut and penetrating as well as informative. The author, Eugene V. Rostow, teaches a course on economic controls in the Graduate Department of Yale University. He is a professor in the Yale Law School, having come there from a New York law office. During the war he was Assistant to the Under Secretary of State and specialized in economic problems.
>
> While there is much in Mr. Rostow's proposals for remedy with which this writer disagrees, there is nevertheless food for thought in the suggestions for treating the major issue of today's economic situation. Coming as his analysis does from one who is on the radical and New Deal side of the argument about the function of the federal government in our national economy, the ideas given here are especially significant in the extent to which the orthodox or conservative point of view is recognized.

Since the notable discussion has now been made available by two excellent publications of general circulation, the JOURNAL will do no more at this time than to call it to the attention of its readers. In passing, we say again that the thinking and writing which Professor Rostow has done exemplifies the kind of service which all members of our profession need to render if free institutions are to be preserved at home and held out as exemplars to the rest of the world. Our crucial problems need to be lifted out of the bog of political buncombe and propaganda cliches and presented to the public in the light of scientific investigation and basic legal philosophy.

The industrial revolution and the acceleration of productivity if not production as well as trade, by modern technology, have set in operation economic forces which were beyond the ken of Adam Smith and could not prudently be entrusted wholly to a *laissez-faire* attitude. The forces and factors of today's world need to be kept in balance for the general welfare and the opportunity of our people, and they have to be kept in that balance, without suppressing or impairing individual initiative and free enterprise. It would be futile to expect that office-holders who are dependent for their positions on popular favor will advance far ahead of public opinion in remedial proposals. Experience reveals their disposition generally to play down to popular trends and wishes without facing the need for adequacy of remedy. If our federal structure of government and our freedom of enterprise are to be made efficient there is desperate need for agencies able and willing to supply the scientific information, the leisurely analysis and the rational judgment that are necessary for any steps approaching solution of crucial problems within

a reasonable time after they arise. Such an agency in our country must be a profession whose experience is diversified and manifest and whose chief devotion is shown to be the common weal. Too often and too extensively the practicing lawyers of America have lacked the detachment, the leisure, the organization, and the will to do the kind of thinking, planning, and advocacy which constructive measures require. Too often, it may be, the professors of law have let their experimental eagerness outrun their experience and their soundness of judgment. But their counsels are needed, and should be welcomed, not scorned. Some way of mingling with them the experience of the practitioner needs to be sought and found.

■ *Challenge to the Lawyer-Citizen*

"The republic will be safe and secure."

"The nation will function as visualized by the founders."

These are two "consummations devoutly to be wished". Elsewhere in this issue, retiring President Roscoe P. Thoma, of the Iowa State Bar, tells stirringly and strikingly the means and conditions for their attainment.

Our aroused profession and citizenry should and will accept these objectives as proper aims. Those who are thinking through the means of bringing them to pass will recognize that Mr. Thoma has stated the essential, really effective methods and course of action, according to the spirit of our institutions and form of government. Difficulties are that among our citizens there are more than a few who are not loyal and faithful to American ideals or are indifferent to them, because of the insidious invasions of alien philosophies or motivations of selfish interest; also, that among citizens who think they are loyal and well-informed, there are many who nevertheless are unwilling or dilatory as to making the sacrifices of leisure and doing the hard work required to fulfill their part in an America intent on perpetuating our institutions and keeping our people free, happy, and fortunate in their individual opportunities.

Mr. Thoma does not overstate the stark realities in pointing out that principles and ways of life and work that have made our country great and our people free are now gravely menaced by the "unsound theories of government presented by vagrant philosophies". This nation was not founded on Marxian philosophies or based on irreligion that denies the dignity and worth of individual citizens. Our country was meant to be a federal republic, a representative form of government conducted through established political procedures rather than a pure democracy ruled by transient majorities, plebiscites, or coalitions of "pressure groups" and selfish blocs. Our country has flourished and our people have attained the highest level of living comfort, security, education, and individual opportunity known to human history, through the maintenance and operation of our system of government by responsible political parties in which, regardless of the vagaries or unbridled ambitions of some leaders, no alien philosophies could long prevail against the patriotism and common sense of the rank and file of party members.

Mr. Thoma sees the strength and solidarity of our party organizations endangered by the indifference, aloofness, and sheer laziness, of very many of those who should be in them and diligently at work in them. When men and women of good sense, patriotism, and informed capacity for inculcating American ideals, stay out of party organizations and work, then cupidity and mediocrity become ascendant, parties tend to become coalitions of self-seeking blocs without unity and devotion to dominant principles, and the demagogue rises to power through preachment and promises of what the largesse of government should give and give, rather than through appeals to the service which enlightened citizens should render to their party and their country in locality, State and nation.

There is much in the American political scene that should be profoundly disturbing. More than a few recent manifestations at the national level have aroused cynical amusement, resentment, even disgust, that further alienate and estrange many citizens from taking part in politics and government. But these states of mind are not remedial; they add to the perils which beset us. Party politics are *not a game;* participation in them, by lawyers and citizens generally, is the price of precious freedoms, of the continuance of free private enterprise and individual opportunity against socializing trends. Mr. Thoma has not over-stated the dangers through prevalent indifference. Members of the Bar are extensively in politics, but many lawyers of fine integrity, background, experience, and devotion to the American ideals, stay out of politics. They hold aloof at peril to our country, our profession, our sons and daughters, our children's children, and to a world which is menaced by arbitrary power, by feeble and fleeting government by blocs, and by onrushing collectivisation and denial of the dignity and worth of individuals, and so needs gravely the example of solidarity and success of free government and free enterprise in the United States. The American lawyer at work in his party organization in his home community has in his hands the future of his country, the hope of the world.

■ *Independence of the Judiciary*

In the codification and revision of the statutory law relating to the federal Courts, which was enacted by the 80th Congress and became operative on September 1 as Title 28 of the United States Code, the Committees on the Judiciary in the House of Representatives and the Senate and those who worked with and for them on that considerable task soundly took the position that "non-controversial" changes could and should be made, along with the clearing away of the obsolete and the compiling, clarifying and integrating of the law to be continued in force. As a result, the new federal Judicial Code, concerning which Circuit Judge Albert Maris writes so interestingly and authoritatively

in this issue from his insight as Chariman of the Judicial Conference's committee on the subject, is truly a landmark in the history of the federal judiciary in that it achieves measurable advance in more than a few respects. Among the most vital steps forward are those to accomplish a greater degree of integration and independence for the Courts of the United States.

The invaluable Conference of Senior Circuit Judges, created in 1922 under the leadership of Chief Justice Taft, was convened at the end of September as the Judicial Conference of the United States, empowered for the first time to report its proceedings directly to the Congress, with any recommendations it may have for or as to legislation. The fiscal and administrative autonomy of the federal judiciary is strengthened, through the Judicial Conference, Administrative Office, and the Director of the latter, who now pays the expenses of the judicial establishment and handles all fiscal details. The historic Circuit Courts of Appeals become United States Courts of Appeal for the respective Circuits, each with a Chief Judge and added powers to facilitate the dispatch of judicial business. All of the Circuit Judges in a Court of Appeals may hear a case *en banc,* under stated circumstances. Each multiple-judge District Court now has a Chief Judge, and the control of the calendars and the handling of cases are greatly improved, with the Judicial Council of the Circuit empowered to intervene and act if the District Judges do not themselves resolve any disagreement as to rules or assignments. Numerous simplifications and improvements in procedures and powers are accomplished—no one of them very drastic or far-reaching in itself, but the whole of them adding up to a very notable legislative achievement in improving the administration of justice.

It is a very encouraging account which Judge Maris has written for us—of substantial and constructive accomplishment by the 80th Congress, unheralded during days and weeks of bitter political controversy. A judiciary which is better organized and integrated for the performance of its functions and can present directly to the Congress its own views and recommendations as to legislation affecting the Courts will tend to become more free and independent of Executive or legislative interventions.

The Realm of the Mind

Why give your life to the Law?

Wherein lies the ageless charm of this abstraction called the Law, which dazzled the eyes of even the Olympian, Justice Holmes? Robert Louis Stevenson was a keen enough observer of the lawyer and judge to perceive the attraction of the Law. In the *Weir of Hermiston* he said:

> To be wholly devoted to some intellectual exercise is to have succeeded in life; and perhaps only in law and the higher mathematics may this devotion be maintained, suffice to itself without reaction, and find continued rewards without excitement.

To civilized man mental activity is as necessary to his life and well-being as physical activity, if not more so. For ages men have striven almost entirely toward perfecting the qualities of their intellects. The struggle for existence is waged today almost wholly in the realm of the mind and by the weapons it can invent. The most obvious characteristic of cultivated men today is devotion to tasks in which the intellect, above all, is employed.

A lawyer's life is spent in solving problems—the myriad problems of humanity. Each task presents an intellectual challenge, a contest, a new and constant opportunity for bloodless conflict. To solve such problems by physical force alone is a confession of intellectual inadequacy and frustration. What surpasses the intellectual pleasure of coming to grips with one of life's knotty problems and solving it rationally, that thrill which Holmes described as "the secret isolated joy of the thinker"?

Intellectual productiveness is no doubt one of life's great joys—if not its greatest. Where, more than in the law, can a man think great thoughts, and trust in his own determined judgment? Where, more than in the law, can men "strive mightily, but eat and drink as friends", gain victory without remorse, win rewards not measured in the medium of the market place?

Best of all, the practice of law is no mere test of skill, no mere legal chess game in which the lawyer exerts his mental powers. The prize that he attains is not a trophy, but justice itself. *Justice!*—that concept which is really the ideal of what men conceive as earthly perfection; majestic, not mercenary; confident, and not proud; firm, but not inexorable; fair, without weakness. To devote's one's life to such ideals is to be engaged from age to age in guiding the patient, often sluggish or confused, march of humanity through time. It is worth—nay, it demands—the *best* that is in a man's soul!

Herein, then, lies the charm of our lady, the Law—in her exquisite power to make men happy in the highest forms of intellectual productiveness, and in victories won on the battlegrounds of the minds of men.

The Inns of Court

The report to our Seattle meeting by the distinguished Committee headed by John W. Davis said, as to the raising of funds whereby American lawyers will assist the restoration of the Inns of Court: "In proportion to the number of lawyers solicited, the response has been small". The amount thus far contributed is lamentably little. The Committee is continuing with steps to expand its campaign. It is "proceeding with the formation of State Committees in order that the appeal for funds for the restoration of the Inns may reach all American lawyers, members and non-members of the American Bar Association":

> The appeal has taken the form in most States of a letter prepared by the State Committee enclosing the pamphlet of the Special Committee describing the damage to the Inns and a subscription blank.

Because the project is an expression of vital things in which we of the JOURNAL profoundly believe and seek continually to stress at this crisis in the history of the world and our profession, we comment on the significance and circumstances of the Committee's appeal and reiterate our earnest hope that the further responses will yield an adequate amount. The interest and the obligation typified by the proposed restoration of the Inns go far beyond ordinary manifestations of the faith and loyalties of our profession. They should be recognized as co-extensive with civilization itself.

The Inns should not be considered nationally because of their site nor their restoration as a gratuity to England or merely as a token to our beleaguered brethren of the British Bar. The Inns are the shrine of our profession; they are the source of Anglo-American jurisprudence, the very cradle of our way of life. Liberty and rights of self-government according to law were not born with the American Declaration of Independence; constitutionalism antedated our Constitution; the privileges and immunities of our Bill of Rights were the common inheritance of Englishmen before they became the first ten Amendments to our Constitution. The fundamental principles upon which all our freedoms are based were formed and molded into rules of law by men trained in the Inns of Court. We cannot hark back too often to these origins and the spirit which then came into being.

The American Revolution was but the continuation in the Colonies of the movement against tyranny, which we now call arbitrary power or totalitarianism, that had been carried to success in England. The establishment of an independent nation in America was not so much a revolution as it was the extension of that evolution of racial convictions which had been developing in England for centuries, and which had been given juridical statement by men of the Inns of Court. The rights for which the colonists fought, let us never forget, were championed in England by Edmund Burke, Robert Walpole, Charles James Fox, William Pitt and others. And five of the signers of the Declaration of Independence, five of the representatives who adopted the Articles of Confederation, and five of the framers of our Constitution, had all been members of the Inns of Court.

A common devotion to the rule of law as opposed to arbitrary will has united England and America and all English-speaking people whenever their way of life has been assailed by despotism, whether the despotism of royalists, dictators, Nazis, Fascists, or Communists. That doctrine of the supremacy of law and its implementation came to us all from a common source—through the historic Inns—brought into existence by three causes:

1. Magna Charta had separated the great Court of Common Pleas from the King's person and retinue and had given it a permanent place at Westminster Hall;

2. The King had prohibited the holding of law schools in London; and

3. The Pope had forbidden the clergy to teach the common law.

The independence of the bishops and barons had been attributed to their familiarity with the law. But the royal and papal attempts to suppress that devotion to law led only to its greater concentration. The men of the law—judges, sergeants, and students—took up their abode in the vicinity of Westminster. Banished from London and denied the assistance of clergy as teachers, the profession established its own community east of the city and adjacent to the site of the Court. The judges, sergeants, teachers and students lived together and found lodgment in the manor houses of the Earl of Lincoln and of the Baron Grey de Wilton, which became Lincoln's Inn and Gray's Inn. They also took over the quarters and churches of the Knights Templars which became Middle Temple and Inner Temple. These four great Inns and some lesser houses came to be what Blackstone recognized as "our judicial university".

It was due to the efforts of men of the Christian church that civil order was superimposed upon the feudal anarchy of the Dark Ages. Men of the church were the only educated men. In them the influence of classical humanism and Christian ethic met, and they examined the philosophy of law and the theory of state in the light of the teaching of a universal church. For hundreds of years the chief ministers of state and justiciars were bishops, deacons, or priests. Bracton, who wrote the first great work on English law, was a priest who had served for twenty years as a judge. It is significant that it was from that source that Coke quoted when he told James that the King was under God and the law.

Has it come to pass in America and in our profession that these things have only an historical interest and are a matter to which we can be indifferent? The thing that is challenged today, and has been challenged for the last twenty-five years, is the concept and philosophy of law which was first conceived by classical philosophers, given political expression by Roman juris-consults, and then actually implemented by the bishop-priest justiciars. It became the very spirit of Anglo-American institutions and was woven into the fabric of our jurisprudence by the men who gained their devotion and spirit from association in the Inns of Court. The thing that is needed in this country above everything else is a revival of the professional spirit. Without a body of men consecrated to the supremacy of law, this country cannot preserve its own institutions and will not be able to meet the responsibility which fate has imposed upon it. We should never forget that when the teaching and practice of the law became divorced from church and crown it was entrusted to a profession which had been impressed by the highest ideals of the law and disciplined in a strict devotion to ideals of independence, security of tenure, and special training for their calling. Otherwise the theory of government subject to and limited by law

could never have been put into practice.

Today men talk glibly of democracy, liberty, rights with strange prefixes—will-o'-wisp words which they relate to nothing fundamental and may mislead us into bogs of confusion and sloughs of despair. The dignity and worth of human beings, the true rights and immunities which constitute our way of life, have no actual existence except in the law and what it vouchsafes. Their implementation depends wholly on an informed, independent, and consecrated judiciary. And such a judiciary depends on an independent and outspoken profession which is actuated by and devoted to the ideals of Anglo-American jurisprudence. We of the Bar discuss endlessly the improvement of the methods of selecting judges, but no method can be effective if there are no good and courageous men to be selected or none with the spirit which commands them to accept and serve. Our constitutionalism depends entirely on our professionalism. Only the ideals and spirit of the Inns of Court can give us a "priesthood of justice".

A generation that will not rebuild its shrines will lose its ideals. A profession insensible to the glorious origins of its vital principles and deathless spirit would become a decadent generation. To aid the rebuilding of the Inns of Court should be made a professional revival, a legal renaissance. In other and truly fraternal ways, our Association is being of humanitarian assistance to a number of lawyers in Britain and the Continent, whose extremity as to food, clothing, and other necessities of life, endangers their existence as members of an independent profession. Our committee headed by Jacob M. Lashly is helping them to meet practical necessities. There is room and need also for this project as to the Inns of Court. On page 954 of this issue is a blank which can be cut out or copied, in making a tax-free contribution.

In urging lawyers to rally to this cause, we have not overlooked the economic plight of many of our members, oppressed by high taxes and inflationary office expenses and living costs. The Committee is asking only five or ten dollars apiece from lawyers. There are very many who can afford to give such an amount or more. Will those who enjoy a rich professional inheritance from the valorous deeds and spirit of those who peopled the Inns of Court do nothing at all to preserve it and restore those shrines, at a time when present members of the Inns are again in the forefront of resistance to alien and destructive philosophies?

■ *Precedent and Certainty in Law and Life*

John Locke wrote long ago that the "Freedom of men under government is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it" *(Two Treatises of Government,* Book II, Chap. 4, §22). Edmund Burke declared that "Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetities; in proportion as their love of justice is above their rapacity; in proportion as their own soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves" *(A Letter to a Member of the National Assembly,* in *Works* (World's Classics Ed., IV, 319). Friedrich A. Hayek, in his current *Individualism and Economic Order,* shows that individual liberty and welfare depend on the existence of legal as well as moral rules that can be understood and relied on by men to give bases of certainty to their lives and endeavors, "which, above all, enable man to distinguish between mine and thine", and to "ascertain what is his and what is somebody else's sphere of responsibility". These considerations can be achieved only through some sense of certainty and continuity in the rules themselves, in the changes from time to time made in them, and in the decisions made and followed under the rules by which men live.

"Stare Decisis or Flexible Logic" is the subject which Ben Palmer discusses in this issue. Modern pragmatists, positivists, realists, and many other champions of the administrative process rather than the judicial, have tended to discount or bring into disfavor the doctrine of precedent as known to the common law. This general opposition to the respect of law Courts for precedent was summarized in President Roosevelt's veto message when he returned to Congress the Walter-Logan bill of our Association in 1940. It should not be surprising, therefore, if judges appointed when the pragmatists and positivists were ascendant and rampant, show a greater disregard of precedent than did their predecessors. To a large extent the recent overturning of precedent and the substitution of "flexible logic" seem to stem from considerations such as those against which Edmond Burke inveighed.

A great deal of our trouble has come from a misunderstanding of the true nature and function of *stare decisis* by both its adherents and its opponents. Some of its adherents construed the doctrine too narrowly and applied it mechanically, and its opponents then attacked the whole doctrine instead of its abuse.

The true doctrine did not call for the blind following of precedent, but rather for the discovery and development of the principle which prompted the precedent. It required the same decision only for cases involving the same facts; otherwise it called for decision as far as possible on the same legal principle, or by analogy. It was not averse to exceptions and variations where circumstances required them. It was the law's attempt to reach the golden mean between uniformity and flexibility, between stability and change, between stagnation and growth.

To disregard precedent would be contrary to everyday practice of men generally. Men of good sense in all walks of life try to profit by the experience of others. Only fools depend entirely on their own. The wisdom of ages on this point has crystallized into a dozen or more aphorisms, such as:

Experience keeps a dear school, yet fools will learn in no other.

It is costly wisdom that is brought by experience. . . . Learning teacheth more in one year than experience in twenty.

Experience joined with common sense
To mortals is a providence.

The experience of our predecessors, however, should inform us but not put us in strait-jackets. To neglect that wisdom wholly would be folly. To follow blindly it and nothing else would be stupidity. Precedents are often cast aside when executives, legislators or Courts, wish to override distinctions "between mine and thine" and win the votes of the many by giving to them, in guise of law, orders or decisions, the property of other men of less power at the polls.

Disregard of sound precedent would be not only contrary to general practice; it would be contrary to one of the basic and essential principles of Anglo-American jurisprudence upon which our way of life depends. Dean Pound says the following are "the three distinctively characteristic institutions of the Anglo-American system": 1. The doctrine of judicial precedent; 2. Trial by jury; 3. The doctrine of the supremacy of the law. These institutions were established, not by legislation, nor by plebiscite, nor by the exercise of arbitrary will, but through the development and evolution of our legal system by judicial decision. Our law could not have had continuity of growth and development except for the doctrine of *stare decisis*. To undermine that doctrine would be to undermine one of the cornerstones of our political edifice.

Under our constitutional system, moreover, an undiscriminating disregard of *stare decisis* by our Supreme Court in the interests of particular classes, groups, or philosophies has a peculiarly deleterious and disturbing effect. In ordinary operation, when a Court decision is out of harmony with current practice or popular opinion, it can be changed by legislation. Constitutional provisions and interpretations, however, can be changed only by the complex procedure of constitutional amendment. When the Court reverses established constitutional interpretations, or gives a construction to the Constitution which its authors did not state or intend, the people have no ready remedy through action by Congress. The Supreme Court ought, therefore, to be unusually reluctant to set aside or change constitutional precedents which have become fixed in our political and social life. It is not the province of the Court to initiate political trends and policies. The authority to do that was vested in the Congress. It was only "the judicial power" that was vested in the Courts. And by that term the framers of our Constitution—and a more worthy group of profound and practical philosophers was never assembled—meant "judicial power" as it was then known to the Anglo-American legal system; and at that time it was definitely characterized by the three institutions mentioned above—the first of which was "the doctrine of judicial precedent".

Editorial From a Member of Our ADVISORY BOARD

■ *The Atomic Energy Tie-Up*

The prospect for atomic peace through law was dimmed by the recent vote in the United Nations Atomic Energy Commission by which the majority agreed to suspend further discussions. Although the majority of the Commission had accepted the principle of international operation of atomic facilities, action had long been blocked by Soviet insistence on "national sovereignty". That the harassed United States delegation should have initiated this action is understandable. Negotiation with the representatives of the Soviet Union can be peculiarly trying, and it appears that the Soviet delegation deliberately avoided any serious effort to reach an atomic agreement in the absence of a general political agreement. It is undeniable that even if a formal consensus were arrived at on the international control of atomic energy, effective implementation during the current "cold war" could scarcely be expected.

It seems unfortunate that the United States delegation took this step of abandoning activity on the United Nations Atomic Energy Commission. Three undesirable consequences of the action can already be seen. As might have been expected, Soviet propagandists and apologists loudly proclaim that the United States is walking out on atomic energy discussions because it does not sincerely seek international control; confusion has arisen because of the Soviet vote to continue discussions which Soviet inflexibility alone has kept so ineffective. Another result is that the United States has lost an international arena, the United Nations Atomic Energy Commission, in which to present its views on atomic energy to the world. United Nations documents, such as Commission reports, are among the few publications to cross the iron curtain where United States books and magazines are rare.

Perhaps the most serious consequences of the suspension of activity on the United Nations Atomic Energy Commission is the loss of valuable daily contact between, not only the atomic energy personnel of the delegations of the United States and those of the rest of the Commission majority, but also the contact, grating as it often is, between the majority of the Commission and the representatives of the Soviet Union and its satellites. Very possibly the only way in which the essential soundness of the position of the majority on the

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Commission, as embodied in its Second Report to the Security Council, can be driven home to Soviet policy-makers is through the persistent presentation of the majority view to the Soviet minority at repeated Commission sessions. Certainly it is futile to plan to present the majority plan to the Soviet people, even if it were possible, since they have no part in determining Soviet policy. Our only apparent access to the Politburo in respect to atomic energy is through their delegates on the United Nations Atomic Energy Commission.

Regardless of when or under what conditions the inevitable general political settlement takes place between the United States and the Soviet Union, it is important to reopen the atomic energy discussions in the United Nations and have the atomic aspect of that settlement outlined as far as may be feasible.

WILLIAM TUCKER DEAN, JR.

New York

Editor to Readers

Before laying down upon the completion of this issue the editorial pen and pencil which he has wielded for more than two years, your retiring Editor-in-Chief takes this means of expressing to members of our Association his heartfelt appreciation of their friendship, interest and support and their many kindly messages, particularly during the past three months, to which he has been unable as yet to make a personal response as he very much wished to do. Manuscripts and correspondence, too, have been somewhat neglected of late, regrettably, under the pressures of selecting and editing material for the recurring monthly issues. These matters will now receive attention as rapidly as can be. No one can serve as Editor-in-Chief of the JOURNAL of our Association without becoming aware of his unforgettable gratitude and debt to the many whose assistance, patience and staunch support, even in the face of disagreement at times, have made the burdens of the post an honor and a privilege. Your retiring Editor-in-Chief bespeaks for the friend of all of us who will be his successor at least an equal measure of confidence and support.

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The foregoing does not mean that your retiring Editor-in-Chief expects to end abruptly and completely all writing for the JOURNAL. He has a few commitments which he hopes to carry to completion. Among these it may be well to mention now and here that he expects to finish and offer to the Board of Editors a sketch of Stephen S. Gregory, the great lawyer who was the 34th President of our Association, the founder as first Editor-in-Chief of the JOURNAL as a monthly publication, the father of the incoming Editor-in-Chief. This has been underway for months but could not be completed while the monthly "grind" continued. Outstanding also is a promise to continue some supervision of the preparation of material underway in the series devoted to State judicial systems and the Chief Justices of State Courts—sketches as to the contents of which the Board of Editors will continue to have the final say. On one or two other projects underway he has pledged to his successor such assistance as may be desired. But the "treadmill" of monthly editing is ended. The Board of Editors has wisely put the office of Editor-in-Chief on a compensated basis, to enable the Editor-in-Chief to give to the work all the time needed and to give it in the Chicago office. The work done by members of the Board of Editors is extensive and invaluable; the full-time staff renders competent and devoted assistance; many members of the Advisory Board give freely of their time and judgment; but the work of the JOURNAL needs the improved and centralized organization it now will have.

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September 21 brought the 81st birthday of Henry L. Stimson, probably the most distinguished of living American lawyers. Forty-two years ago he entered the service of the public as United States Attorney for the Southern District of New York, and made a notable record of achievements as a lawyer. In the intervening years he has held high posts under six Presidents and was in the Cabinet of three Presidents. Through it all he remained an independent lawyer, the head of a large and effective law firm, as vantage point from which to go forth when summoned to public service and to which to return gladly when his task was done. Although many of his countrymen have disagreed with and deplored some of the causes he espoused or countenanced in critical years, his own performance and the standards on which he insisted for his own work have shed great luster on the record of American lawyers in public service. Today truly one of our elder statesmen, his brethren of the Bar acclaim his accomplishments and wish for him many years more of happiness, health, and capacity to give wise counsel.

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In recent action of the Senate of the United States there is reason for reassurance, on the part of those who believe it to be the high duty of federal Courts, including the Supreme Court, to insure to litigants the full measure of judicial review vouchsafed by law as to orders and decisions of administrative agencies in the Executive branch of government. It is dependably reported that during the sessions of the 80th Congress the Senate was unanimous—or so nearly so as to amount to unanimity—in opposition to the decision and rule of the *Dobson* case (320 U. S. 489), which was regarded as an instance of the "judicial abdication" of which Ben W. Palmer wrote so forcefully in our September issue (page 761). The issue of reviewability that was passed on in the *Dobson* case involved the Tax Court, an

agency in the Executive branch; and, as discussed in the article by George E. Ray and Oliver Hammonds in this issue (page 870), the Court exhibited its propensity for "judicial deference" to agency rulings and denied to persons aggrieved by a decision of the Tax Court any such extent of authentic judicial review as the Congress had plainly intended and provided as to agency rulings generally, in the Administrative Procedure Act and otherwise. The Senate unanimously insisted that in connection with the enactment of the new federal Judicial Code as described by Judge Maris on page 863 of this issue, a bill should be enacted to undo the ruling in the *Dobson* case and assure an adequate, substantial judicial review as to the Tax Court. The House of Representatives gladly accepted this provision, and President Truman signed the bill. This won another victory for the principle and practice of plenary judicial protection for the rights of persons and property, against arbitrary, unlawful or unfounded administrative action—a rule of right and justice for which our Association has long stood, and which President Holman has stressed, in our September issue (page 758) and again in this issue (page 927).

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Another straw that shows "which way the wind is" may be found in what took place in the House of Delegates during our Seattle meeting. Some Bar Associations, notably the Association of the Bar of the City of New York, had initiated or supported in 1947 and early 1948 proposals to amend the Constitution of the United States so as to give constitutional "security" to the present number of Justices of the Supreme Court (34 A.B.A.J.; January, 1948). These had been brought forward on the express ground that such measures would best be considered at a time when the Court was not under discussion or attack; the Association of the Bar Committee urged "the necessity of taking action to safeguard the Court at a time when its independence is not imminently threatened rather than at the time when the next attack is launched" (34 A.B.A.J. 2; January, 1948). After debate and with some division of opinion, the House of Delegates approved and recommended several of these proposals for amendment last February (34 A.B.A.J. 264 and 342; April, 1948). In the House in Seattle, a further proposal for similar purpose was offered, with the support of the Committee on Jurisprudence and Law Reform (with four members dissenting) and the Committee on the Judiciary. This was a proposal to amend the Judiciary Article of the Constitution so as to fix the jurisdiction of the Supreme Court so as to put it expressly beyond control of the Congress, by providing that Court "shall have appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact, *with such exceptions and under such regulations as it shall make*". The proposal, particularly its last clause, aroused a volume of debate and opposition. The House refused to approve, and sent the matter back to the Committee. Various grounds of opposition were urged, but an underlying consideration seemed to be a disinclination on the part of many members of the House to vest the Court with power to make "such exceptions and regulations" as it sees fit and thereby to place its basic jurisdiction in some constitutional cases expressly beyond the powers of the Congress. This point of view was manifestly a feeling, rather than a reasoned argument, on the part of those staunch believers in an independent non-political judiciary who were actuated by it; but the opinion was significant, and the whole debate confirmed that the great Court is again the subject of very active discussion and differing opinions, as has appeared clearly from time to time in the JOURNAL. There came to mind the statement or prophesy recently made to your Editor-in-Chief by a jurist in high place, one of the keenest American observers and analysts of trends. "We may as well face the fact", he said, "that the Court is again under attack, and that another attempt will be made to deal with the Court by statute—to 'pack the Court', as the Bar called it before. The $64 question is: Will the Court have this time the backing of the Bar as the Court did in 1937? I see many signs that this time the lawyers will not rally to the defense of the present Court and the defeat of the legislation as they did before." Your retiring Editor-in-Chief leaves this vital question for the serious thought of all members of our Association and does so in the spirit stated in our editorial, "Discussing Decisions of the Supreme Court" (34 A.B.A.J. 584; July, 1948), which accompanied the first of Ben W. Palmer's articles.

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That a radical Left Wing movement in the guise of a political party, led or largely influenced by those who are or have been Communists or Communist sympathizers, *can* work and worm their way to power in government among English-speaking peoples whose devotion to law and free enterprise is no less than our own, was brought forcefully home to members of our Association who visited Victoria and Vancouver, B. C., and other Canadian cities, in connection with our Seattle meeting. In the Province of British Columbia, for example, our members were received and entertained by a "coalition government"; the two great traditional parties of Canada, the Liberals and the Progressive Conservatives, had combined their forces several years ago, as the only means of preventing the control of the Province by the radical CCF (Cooperative Commonwealth Federation). In the Province of Saskatchewan, the CCF is reported to be in control of the government. Even in the Province of Ontario, the CCF is now "the opposition" in the House of Commons, with the Progressive Conservatives in power and the Liberals in third place in the number of seats. All of which gives point, force, and warning, to Roscoe P. Thoma's plea, published elsewhere in this issue, that no lawyer anywhere should hold back from taking an active part in the affairs and work of his party.

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Horace Russell, of Chicago, who was accorded the leading space in our February, 1948, issue (34 A.B.A.J. 89) to set forth and argue the views he has been urging as to the national housing emergency, offered from the floor in the Assembly on the opening day of our Seattle meeting a lengthy resolution directed mainly at the JOURNAL, perhaps chiefly at the editorial in our August issue (page 704): "Congress Should Act for Adequate Housing". Mr. Russell asked the Assembly and House of Delegates to adopt his resolution, which read in part as follows:

> WHEREAS, the House of Delegates of the American Bar Association, in Chicago, in 1948, passed a substitute resolution which was intended to support private home ownership and private housing; and . . .
>
> WHEREAS, nevertheless, the AMERICAN BAR ASSOCIATION JOURNAL has repeatedly carried editorials which can be construed only as criticism of the Congress on this subject and has, in effect, urged a federal government public housing program . . .
>
> THEREFORE, BE IT RESOLVED, That the American Bar Association support private home ownership and the private ownership of rental housing, farms and other commercial real estate; and
>
> BE IT FURTHER RESOLVED, That the editors and management of the AMERICAN BAR ASSOCIATION JOURNAL be and they are hereby instructed to discontinue support of the public housing lobby.

The Assembly's Committee on Resolutions, to which Mr. Russell's proposal was automatically referred under the Association's Constitution, decided to recommend the referral of the resolution again to the Section of Municipal Law and the Section of Real Property, Probate and Trust Law, which have held and expressed opposing views on the subject, although no substantial part of the membership of either Section has ever taken part in a debate and vote on the Section's attitude. The Resolutions Committee's recommendation was based on the fact that the action of the House of Delegates last February (34 A.B.A.J. 269; April, 1948) had supported the principle of private ownership of homes and construction by private capital, but had also favored governmental assistance where needed for low income groups in particular localities. It will be recalled that the unanimous action of the House in February was in adoption of a resolution drafted and agreed on jointly by the delegates of the two Sections with a representative of the Board of Governors sitting in. The recommendation of the Resolutions Committee for referral was approved and adopted by each the Assembly and the House of Delegates.

The JOURNAL has strongly and repeatedly called attention to the severe and continuing shortage of homes for our people at reasonable prices or rentals, and to the alarming consequences which the high costs and the dearth of decent living accommodations are inflicting on the home life and the well-being of millions of our people, particularly the veterans and the younger folks and their families. We have urged insistently that adequate remedial action be taken by the national government and by State governments, as speedily as possible. All this was, we believe, in the resolutions adopted by the House of Delegates. We have called attention to the fact that this acute and nationwide emergency has been caused largely by inflationary federal policies as to wages and prices, by collusion between contractors and labor organizations exempted from anti-trust laws, and by administrative failures to foresee and provide in time to meet the shortage of homes that was bound to arise when our sons returned from the war. Supporting the declared policy of the House of Delegates, we have believed that if the federal shortcomings could be overcome through relieving the desperate plight of the low-income groups in many localities, it could reasonably be hoped that the energy of private enterprise liberated and aided by the measures enacted by the 80th Congress could cope with the needs of other groups within a time not unreasonable. The views expressed in our editorial columns were endorsed and supported by a large majority of the members of our very representative Advisory Board, at the time we referred to that body Mr. Russell's argument and our reply (34 A.B.A.J. 89 and 91; February, 1948). The JOURNAL has given no support to any "public housing lobby" or any "lobby" of real estate and financial institutions.

The tenor of Mr. Russell's resolution in the Assembly presents another issue to which we refer briefly: The usefulness of the JOURNAL to the Association, the profession of law, and the American people, depends on the independence and vigor with which it is conducted by its Board of Editors with the counsel of its Advisory Board. The policies of the JOURNAL have been and should be those decided on through the deliberative, representative processes of the Association; we have advocated earnestly those policies as we have understood them, from having had some part in their formulation and promulgation. We have welcomed, and have freely published in our columns, all manner of criticism as well as commendation of particular editorials and articles published. That is every reader's right. But the idea of an attempt to use the political and legislative processes of our Association to oppose particular editorials in the JOURNAL and to instruct and command its editors to follow a particular course and discontinue the publication of editorials that have been sincerely written in what was believed to be the public interest, is a provocative and disturbing manifestation, because it challenges the independence which the JOURNAL needs and must have to do its job. Happily, the further examination of the Association's remedial stand for adequate housing need not be related to the attempt to impose an external control on the editorial policies of the Board of Editors, beyond their fealty and fidelity to the policies declared by the House of Delegates.

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We of the JOURNAL have lately asked the opinion and advice of all members of our representative Advisory Board as to whether our news and editorial columns

thus far this year have soundly treated the questions arising as to Communists and Communism in the United States and as to what should hereafter be the JOURNAL's policy and attitude on the legislative and other proposals and our handling of further discussion of the subject in our columns. The responses, which came from lawyers, judges, law teachers, etc., in all parts of the country, have been most enlightening and helpful. Practically without exception they have sustained and commended the JOURNAL's course and contents thus far, although naturally varying angles of emphasis and objective have been expressed as to the future, to the end that this magazine may make an informed contribution to the prevalent public discussion and to public opinion of our time. The consensus was intended to be reflected fairly in the leading editorial in our August issue (page 696): "The Point Where Toleration Ends". This statement has since been commended and endorsed by many of our members, at the Seattle meeting and otherwise. With it is now to be read and taken into account the debates which took place and the actions which were voted, in the Assembly and the House of Delegates in Seattle. These are reported in summary elsewhere in this issue and will be dealt with further in our November issue.

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One of the most sagacious counsels that we received from members of our Advisory Board came from Frederic R. Coudert, of New York, who at the age of 77 is still engaged in the active practice of his beloved profession but never lacks the time to advise and assist us from the vantage point of his great international experience and his keen interest in the effectiveness of the JOURNAL in behalf of objectives in which he profoundly believes. With permission granted at our request we quote from what he wrote us. After expressing his difficulty in dealing with the matter "categorically" and his own belief in "the Anglo-American system of free expression of opinion", he went on to say:

> The problem, however, is one of how far we should apply that system to those who are using tolerance for the purpose of destroying our Constitution, its guarantees and our free institutions. The practical answer to this is more difficult than the theoretic answer, but I think that so far the JOURNAL has handled the matter wisely. Our columns should be open to a fair discussion of the methods to be employed for carrying out the objective, which objective I take to be the maintenance of our Constitution and free institutions; and that a certain amount of restraint must be placed by law upon those who, with subversive intent, and with complete contempt for truth, carry on war against our governmental system. I see no reason why such persons or groups are not in reality guilty of what it is perfectly fair to call treasonable conduct—that is, a line of conduct intended to destroy by subterfuge and violence the American system. Each piece of legislation should be subjected to scrutiny, so that the general rules of "due process of law" would be observed.

Our distinguished adviser would not hold back from full and condign punishment for those who are found guilty according to American concepts of fair trial according to law, and his words of warning from world experience should have weight in this hour. He said:

> No individual or organization should be considered guilty until that guilt was proved in legal fashion; but once shown to have been engaged in conspiring to overthrow the Constitution, I do not see why we should hesitate to subject such persons to the penalty which such completely disloyal and nihilistic conduct comports. I realize the difficulties of the situation, but recent history has taught that a very small minority who, without regard for accepted rules of morality or any consideration for human life, may be capable of subverting whole nations. This is a danger which we now know to be real and not merely theoretic. To close our eyes to the facts of history and to continue to permit such persons to carry on untrammeled their activities could well lead in our case, as elsewhere, to the destruction of liberty and of those constitutional rights which have made this nation what it has been in the past and what we must insist that it shall remain for the future.

"Views of Our Readers" in this and other recent issues reflects the grave and increasing concern of American lawyers that the imminent problems shall be dealt with adequately, promptly, and in a manner which is consistent with fundamental American ideals, but also adapted to meet and overcome the new techniques of Communist organizers and those who openly or covertly work with them or are used by them for their sinister purposes.

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Martin Popper, a member of the New York Bar, now a vice president and for years the secretary of the National Lawyers' Guild, was reported in a dispatch to the New York *Herald-Tribune* on September 7, as having invited and urged the third Congress of the International Association of Democratic Lawyers, convened in Prague, Czechoslovakia, to send to New York a committee of lawyers from the sixteen nations represented by Communist or Left Wing spokesmen, to observe and "report to the world" the fate of the twelve indicted Communist Party leaders who are soon to go on trial. He was reported as declaring that these indictments "mean the end of a government of limited powers" in the United States and that "It is the collective responsibility of the democratic lawyers of the world to take such steps as are in their power to prevent this destruction of civil liberties in the United States". The plea of the representative of the National Lawyers' Guild followed an address by Professor Alexei Denisov, a doctor of juridical science at Moscow University, in which the latter declared, without rebuke from Popper and his associates in the NLG delegation, that "in 170 years only one member of the working class has been elected to the Congress of the United States". Such a statement is and has been utterly baseless; it is refuted by the composition of each and every one of the eighty Congresses which have been convened since the adoption of the Constitution. "Working class representatives" in recent years in the Congress have included members in good standing in AFL unions and CIO unions; but they have been elected as Ameri-

cans representative of the free constituencies which chose them. In the United States a legislator or public official does not have to be a member of the Communist Party to be recognized as an American who has earned the right to speak and act as a representative of the working classes to which he belongs. As to Popper's plea for Communist or Left Wing intervention in the forthcoming trial of "top" Communists under indictment for overt acts against the government of the United States, he as a member of a New York law firm should be well aware that the accused will receive a scrupulously fair trial according to the American tradition and will be convicted only if they are clearly shown to be guilty according to the law and the evidence. These events of the Prague conference, assembled in the shadow of the tragic events which overthrew free government in Czechoslovakia without protest from Popper and his associates in the National Lawyers Guild, confirm the high duty of the organized Bar in every community to be unceasingly on guard against Communist maneuvers and the activities of Communist lawyers. These events also have a bearing on the propriety of the decision of the Board of Governors that a member of the Bar who states that he is, or is ascertained to be, still a member of the NLG from which many leading "liberals" resigned, should not be presently admitted to membership in our Association. They would hardly find themselves in accord with the declared policies of our Association as to Communism and Communists, reported elsewhere in this issue.

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In writing the JOURNAL for information as to the article in our columns by Nat Schmulowitz ("Liberty, Laughter and the Law", 34 A.B.A.J. 360; May, 1948), on which the *Saturday Evening Post* based a leading editorial reprinted in our August issue (page 651), John Pearson, Managing Trustee of the Hanover Institute at Dartmouth College, asked for information also as to the widespread interest which the Schmulowitz article aroused. He added, in a postscript, which we quote with permission: "I ask this because the psychological studies lead to new insight into human relations in a new light. The rather dismal current scene, internationally and at more local points, might be brightened, it seems from our findings, if a better understanding existed of the part played by humor in getting along with folks. This is why the Schmulowitz article is so timely, from our point of view. Our study of the neglect of humor by American university education certainly raises a basic question about education. Thank goodness for leadership of such journals as yours."

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The passing of Chief Justice Hughes brings to mind the sentence which is most often quoted from his utterances: "We are under a Constitution, but the Constitution is what the judges say it is." The truth of this observation has a new and reminiscent meaning for members of the Bar today; it is perhaps natural that the rest of the sentence is rarely included in the quotation: "and the judiciary is the safeguard of our liberty and of our property under the Constitution." The famous declaration by the late Chief Justice is, we think, commonly ascribed to an address which he made after he had resigned as Governor of New York and had served for some time as an Associate Justice of the Supreme Court. Our information has been that it was first made by him in extempore remarks on May 3, 1907, at Elmira, New York, a few months after he became Governor and before he had served in any Court. On that occasion he discarded a prepared address to reply to John B. Stanchfield, a noted Elmira lawyer who had been the unsuccessful Democratic candidate for Governor of New York in 1900 and then had removed to New York City to become a leader among trial lawyers in the metropolis. Recognizing the verity of the first part of the famed avowal, American lawyers will hope for the eternal truth and force of the rest of the sentence.

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Striking illustration of the favorable public relations which are fostered, and the excellent nationwide publicity which often is obtained, when a committee of our Association does something of practical public interest, is afforded by a recent issue of *Collier's* magazine, which devoted its leading article to "Traffic Traps for Tourists". Featured in the first column on the first page were "hints" in the nature of specific advice as to "what to do when stopped for a traffic violation outside your State". These were stated to have been "prepared especially for *Collier's* by members of the Traffic Court Committee of the American Bar Association". "Probably no Court is familiar to more people and subjected to more critical appraisal by them than the traffic Courts of America," Tappan Gregory, president of the American Bar Association, was quoted as saying. "Our Association has sponsored an active program of improvement in every phase of this type of litigation."

President Gregory and Director James P. Economos, of the Committee, were quoted in the article which gave many vivid instances from many States of flagrant denials of justice and fair play by police officers and judges having jurisdiction over traffic violations—abuses which our Association is doing practical things to lessen and abolish.

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The Advisory Board of the JOURNAL, with the Board of Editors and two members of the Chicago staff, met in Seattle at luncheon on September 7, high in the tower of the Washington Athletic Club, as the guests of Lane Summers, Washington State member (34 A.B.A.J. 797; September, 1948) of the Advisory Board. Our "gastronomic host" welcomed most heartily the more than forty members present. As informal chairman, Judge Robert N. Wilkin, of Cleveland, presided over the conference as he did in Cleveland in 1947. More than half of the States were represented in the diversified group, which included federal and State judges, law school deans and

law teachers, and practicing lawyers from all parts of the country. Several problems of the operation, contents and policies of the JOURNAL were discussed and the views and suggestions of those present were elicited. For the Board of Editors, E. J. Dimock announced the resignation of the present Editor-in-Chief, the decision that the future of the JOURNAL requires that the post of Editor-in-Chief be put on a salaried basis and filled by a practicing lawyer who can give all necessary time to it, and the selection of Tappan Gregory, of Chicago, as Editor-in-Chief for the November and subsequent issues.

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In publishing this month in our department devoted to international law the full text of the revised Draft Declaration on Human Rights now before the General Assembly in Paris, we have printed also the text (translation) of the grounds assigned by the Soviet Union for its dissent and abstention on the final vote in the United Nations Commission on Human Rights. Our particular reason for doing so is to enable our readers to see the tactics, psychology and phraseology of a Russian statement on such a subject. The Soviet Union uses much the same phrases as Americans do and professes to seek about the same objectives, in oblivious disregard of millions of prisoners held in "slave labor" camps, of uncounted Russians sent to die in Siberia when their submissive loyalty to the Communist Party became suspect, the shocking seizures of free governments in Central Europe. "By their fruits ye shall know them."

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The outcome of the Texas primaries for the Democratic nomination for United States Senator, equivalent to election, is not beyond doubt at this writing; but the closeness of the count gives fresh emphasis to Roscoe P. Thoma's plea, published elsewhere in this issue. With more than a million votes cast, fewer than 400 votes, perhaps no more than 100, will decide a nomination that may have momentous political and public consequences. No doubt hundreds, perhaps a thousand and more, of Texas lawyers did not vote, much less work, in the primaries of their party. The lawyer who plays bridge or golf instead of taking part in the local management and policies of his party organization, endangers the birthright of us all—the success of free government by the electorate—every voice and vote counts.

Lawyers as Defenders of Basic Rights and Liberties of the People

■ The legal profession is charged with the duty and responsibility of administering justice under the law. Daniel Webster said of justice that it is "the ligament that holds civilized beings together" and the "greatest interest of man on earth". Justice—sure, equal and speedy for all—flows from liberty, which was the keystone on which our nation was founded and on which it has become the greatest country in the world. "The major problem of human society is to combine that degree of liberty without which liberty becomes license." The legal profession—lawyers and judges alike—thinks and acts always for solution of this problem in terms of human welfare and rights and the security and happiness of all the people.

The continued existence of a civilized society is dependent on the proper administration of justice. Such an administration is a substantial part of the foundation of civilization as we know it. The primary responsibility today of protecting and strengthening that foundation rests on American judges and lawyers —on you and me. Lawyers above all citizens should be eternally vigilant, and should resist all attempts to undermine our system of justice and our cherished liberty as established and ordained in the Constitution. We must see to it that no one scuttles the constitutional system which made our freedom, our system of justice, and our civilization, a reality. From its inception to its zenith as a world power, the government of the United States was conceived and formed, and has been shaped and directed, by lawyers. It is an everlasting monument to the profession of law. You and I know that our republic will survive so long as—but only so long as—the public has confidence in and respect for our Courts and for the Bar and the administration of justice. We tell the world that ours is a government of laws and not of men. It is up to us as lawyers to protect and preserve that great principle.

We all have to concede that man-made law is not, and will never be, perfect or static. Law must grow and expand with the times. History records that oftentimes would-be dictators and others have sought to subvert, and have subverted, man-made law to their own personal lust for power, to the detriment of fundamental rights of the people. Lawyers are trained and accustomed to see to it that those rights are protected against invasion, whether by government or otherwise. That we sometimes fail because of individual or temporary situations should not deter us from our eternal task—seeing to it that the rule of law rather than the rule of force should be vouchsafed and preserved to our people.

—From the address of Walter M. Bastian, of the District of Columbia Bar, on "Lawyers and the Public", before the 1948 United States Judicial Conference for the Tenth Circuit

THE PRESIDENT'S PAGE

FRANK E. HOLMAN

■ During the twelve months I am to be your President, I shall address several thousand members of our Association face to face in meetings of State and local Bar Associations. Through this page in the JOURNAL I hope to be able to speak, and to bring a message, to each member of our Association *in every month I am in office*. Whether I can do so depends on whether you read this page each month. Some of you will recognize what you read here as made up in part of what you may have heard me say in your State and local Bar meetings. To any such, I point out that no very large percentage of our total members are likely to have heard a particular speech. In fact, a large proportion of our membership has never heard any speech by a President of our Association during the year he is in office.

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The point to be made here is that the success of the work of any Association year is largely dependent on the help and cooperation which the President receives from the whole membership. During our Seattle meeting I was deeply stirred by the many assurances by the members present that they were going home to work and to enlist the assistance of other members for carrying forward our principles and program. If those purposes are translated into twelve months of action in every home community in which we have members, we shall be able to show results for our imperilled country and for our profession—both of which are endangered by the same sinister, insidious forces that are trying to undermine our republic.

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To any member who has not yet read the statement which I made in the September JOURNAL (page 757), I express again my appreciation of the honor and the privilege of being the President of our Association. It is the greatest honor and opportunity of my life. With so many things that need doing and could well be undertaken by our Association, we are in for a difficult time in selecting and deciding what we shall actually try to do and stress.

Our activities have been extended far ahead of our resources at present costs of doing things. We have many members who are able and willing to render outstanding service, but we have very limited funds as proceeds from dues and very limited Headquarters facilities and staff. The patterns of our work will have to be cut down to fit the cloth we have. We cannot do everything we would like to try to do; we shall have to pick and choose the more important and feasible things for the present year. Our new Committee on Scope and Correlation of Work has a hard and important job of selection and planning. No member should feel disappointed if we cannot give major emphasis to some project in which he is interested. Our needs are for much larger revenues and for an adequate Headquarters building, facilities and staff. We have lately had word of generous gifts, but they are for specified purposes and are not yet available. To do our full job will require more revenues from dues, and that means the obtaining of more members. *You* can do that.

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I am not in favor of large-scale "membership drives" and "high-pressure" solicitations. They too often bring in members who do not stay with us, because they are not heartily in sympathy with what our Association is trying to do. Some are induced to join to see what they can get out of being members. What we need and want is members who join because they believe in what our Association tries to accomplish and so are willing to join in order to help. We ought to have 75,000 members instead of about 42,000. We can get several thousand more members during this year if every member will make himself responsible for trying to obtain at least one desirable new member. I ask *each of you* to do that as soon as you can, if you want to help your Association and make this an effective year of work. We can increase our work as the dues from new members add to our expendable revenues. Our immediate goal should be at least 50,000 members and a Headquarters building, facilities and staff to handle a membership up to 75,000. If each of you individually will help by getting new members, we can avoid cutting down and can even plan for expanded work.

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The obligation of the American lawyer does not consist solely of the faithful representation of clients. He must stand ready, fearlessly and unselfishly, to rally to the defense of law as justice and of our kind of government and free institutions. As grave national and international issues arise, each of us must be ready, not only individually but also through organized Bar Associations of adequate memberships and resources, to defend and preserve liberty under law. Liberty under law means not only that your acts and mine shall conform to law, but that all public

officials from the highest to the lowest shall likewise conform to law and serve within the spirit and the intendments of our constitutional republic. In recent years high public officials have too easily fallen into the habit of asserting that some crisis or emergency exists which justifies extraordinary and extra-legal procedures. We have endured much through government by crisis. Almost invariably it is sought to fasten these "temporary" expedients on us permanently.

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The chief genius exhibited by our forebears in setting up the structure of our government was that they established, and intended to establish, a completely independent judiciary to which the citizen at all times might have free access—his day in Court—for review and redress of lawless acts, not only on the part of other individuals or groups of individuals, but even by government itself.

Without this free access to the Courts for independent and adequate judicial review, all our basic rights and freedoms become high-sounding "paper" declarations of things to be hoped for but dependent always on the will of a particular President or the particular majority for the time being in power. Most of the guaranties of the Constitution are for the protection of the individual citizen against the acts of Government officials and for the protection of local self-government. If the acts of the executive department, or of the majority in Congress, are not subject to full judicial review as to their constitutionality, legality, and conformance to fair play, the basic rights of the individual, and even of States, no longer exist as rights, since they are enjoyed only during the pleasure of executive or legislative fiat. To our profession belongs the privilege of advising the whole body of the citizenry as to its rights—on us is also the obligation of maintaining these rights through a resort to the Courts. We cannot stand by and keep silent when Courts "abdicate" this duty of reviewing the rulings of arbitrary agencies. This is one of many reasons why our profession is so essential to the functioning and continuance of free government.

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A primary duty of our Association is to emphasize and re-emphasize, on every occasion and in every way, that the lawyer in each community is not only the best friend and counsellor of the rank and file of the people and the champion of their freedom to live their own lives in their own way as long as they practice fair play as to all other men, but that the lawyer is also the staunch defender of the basic principles of the Constitution and the form of government which assure and safeguard the liberties that Americans often take too much for granted.

1949 Ross Prize Competition Will Aid Survey of Our Profession

■ The Board of Governors in Seattle approved the recommendation of a sub-committee consisting of Howard L. Barkdull, of Ohio, Alvin Richards, of Oklahoma, and William L. Ransom, of New York, that the 1949 competition for the Ross Essay Prize of $2500, open to all members of our Association, shall be utilized to aid the survey of the present and future of our profession. After carefully considering several suggested subjects, the following draft by the subcommittee was selected and announced to the Annual Meeting, with the hearty approval of Reginald Heber Smith, Director of the Survey of the Legal Profession:

"What is the Proper Place and Function of the Lawyer in Society?"

In elaborating on and explaining the subject, the sub-committee said:

> It is intended that this shall include the place and function of the lawyer individually and through Bar Associations in the United States, today and for the future, with particular emphasis on constructive thinking and the proposals as to:
>
> 1. The function of the lawyer in the relationship between the individual and the state.
> 2. The lawyer's relationship to government.
> 3. His work for clients.
> 4. His participation and leadership in public affairs.
> 5. Organization for making competent legal service available at moderate cost or free, for all who need it.
> 6. The maintenance of:
>   a. Individual opportunity.
>   b. Basic rights.
>   c. Private property and enterprise.
>   d. Our form of government as a constitutional republic,
>
> The author is at liberty to select all or any of the aspects of the lawyer's functions here listed, as he may choose.

This is believed to be the most important and fundamental subject which has ever been selected and submitted for thinking, research and written discussion by American lawyers, through the medium of the historic prize founded by the testamentary benefaction of the late Judge Erskine M. Ross, of California. It is hoped that an unprecedented number of practicing lawyers, judges, and law teachers, will decide now to take part in the essay contest and begin their preparations for so doing. Irrespective of the winning of the attractive prize, all essays submitted in the 1949 competition will be of assistance to those in charge of the Survey and will be examined accordingly. The formal announcement of the conditions, etc., of the 1949 competition will be in the November JOURNAL.

MISCELLANEA

THE GROWING PRACTICE of testamentary bequests to Bar organizations for their work in the public interest was accentuated when the will of the late Chief Justice Hughes was offered for probate on September 15. The sum of $25,000 was given to the Association of the Bar of the City of New York, $15,000 to the New York County Lawyers' Association, and $15,000 to the Legal Aid Society of New York City. He had been the president of each of the three organizations.

A NOTED JUDGE whose experience and standing entitle him to speak with great authority recently voiced his grave concern over the increase in crime, particularly among the young, and declared that he was "appalled" by the nature and extent of the crimes which came under his cognizance in Court. "You find murders, attempted murders, robberies with violence, robberies of old and young people, robberies of both sexes, and women walking out at night on lawful business being assaulted", he said. A recent report showed that 59 per cent of the 20,874 persons convicted of breaking and entering were boys and girls under seventeen years old, and 32 per cent of the 69,127 larceny cases in which convictions were obtained were in the same age group. Compared with 1938, the figures for entering and breaking cases showed an increase of 93 per cent, but in the age group of those between seventeen and twenty-one years the increase was 140 per cent.

The distinguished jurist was not discussing the increase in juvenile delinquency in the United States, where the retention of the capitalistic system and the prevalence of notions of economic and political freedom have been charged to be the causes of unrest and moral breakdown among the young people. The speaker was Lord Goddard, the Lord Chief Justice of England under the Labor Government, at a dinner of jurists in Mansion House, London; and he was describing current conditions and trends in England and Wales—an increase in juvenile delinquency and crime that takes place at a pace almost as rapid as Britain's socialization of its industries and abandonment of free enterprise. "It is all very well to talk about the reformation of the young criminal", said the Lord Chief Justice, "but when in the Court of Assize you find such a state of affairs it really beggars description." It may be opportune to bring Lord Goddard's statement to the attention of those who blame American conditions upon our retention of the capitalistic system. Can it be that collectivism does not cure? The increase in juvenile delinquency and crime in both countries may be in part attributed to like factors—the rise and prevalence of philosophies which inculcate disrespect for the law and religion, flout the authority of the church and the family, and subordinate the God-given dignity and worth of the individual to the cupidity and selfishness of the mass of people taught to depend on government for a living and for security.

"BY NO MEANS THE LEAST important of the many benefits which Seattle will derive from the current deliberations of the American Bar Association is an increased awareness of the importance of our judiciary," said the leading editorial in the Seattle *Post-Intelligencer* on September 8, entitled "Every Voter's Duty in Judicial Election". The editorial concluded by saying: "Lawyers, in daily contact with most of the candidates, are in a better position to judge their qualifications than the average layman—and the candidates favored by a majority of the Bar Association members are more likely to be the best fitted for judicial positions."

PLAQUES HONORING FOUR well-known legal and juridical personalities who once lived and worked near the United States District Court building in the District of Columbia have been placed at appropriate nearby points. Exercises for the purpose were conducted in front of the Court building on June 21, with the District of Columbia Bar Association taking part. Mr. Justice Harold H. Burton of the Supreme Court extolled former Chief Justice John Marshall as "the founder and teacher of the Bar in the nation". Justice Edward S. Delaplaine, of the Maryland Court of Appeals, termed former Chief Justice Roger B. Taney "an able, honest, and fearless Court justice, whose important services, since the bitterness of the Civil War has gone, are now unobscured by vilification". Spencer Gordon, of the District of Columbia Bar Association, spoke on former Chief Justice Salmon P. Chase; William E. Leahy, also of the District of Columbia Bar, discussed Daniel Webster. Commissioner Guy Mason thanked the Columbia Historical Society for the plaques, marking the home sites of the four distinguished lawyers, "on behalf of the District and the nation".

WHEN THE MUNDT-NIXON Sub-Committee of the Thomas Committee interrogated Mikhail Ivanovitch Samarin, one of the Russian teachers who figured in the sensational international incident which revealed the attitude of at least some Russians toward return to the Soviet Union after they have seen at first hand the freedoms and oportunities enjoyed in the United States, the following took place, according to the official transcript as reported by the New York *Times* on August 13:

> Mr. Mundt: Why did you wish to have the subpoena served on you by

this committee?

Mr. Samarin: Because my family (Mrs. Samarin and three young children) and I do not want to return to the Soviet Union, because my wife and I renounced our Soviet citizenship and because I want to speak openly and truthfully before an official American body about the activities of the Soviet dictatorship and the conditions of life of the Russion people under it.

Mr. Mundt: Now that you have made this statement to the committee, what would happen if you should now return to Russia?

Mr. Samarin: My wife and I would be shot or sent to a concentration camp for life.

The answer was based on provisions of an order of the Central Executive Committee of the USSR of November 27, 1929, which Chairman Thomas said had been reprinted in 1947 as an appendix to the text of the Soviet Criminal Code. It dealt with persons who had refused to return to the Soviet Union after being on foreign assignment. American lawyers with their traditional abhorrence of *ex post facto* laws, forbidden by our own Constitutions, should note and long remember the last paragraph of this cruel proscription, as translated for the Committee by Dr. V. Gsovski, Chief of the Foreign Law Section of the Law Library of the Library of Congress:

1.... The refusal by a citizen of the Soviet Union, who is an official of a Government agency or enterprise of the USSR active abroad, to comply with the request of the organs of the governmental power to return to the confines of the USSR shall be regarded as a flight to the camp of the enemies of the working class and the peasantry and shall be qualified as treason.

2.... Persons who refuse to return to the USSR shall be declared outlaws.

3.... Outlawing shall entail:

a.... Confiscation of all property of the convicted person; b.... Shooting him to death within twenty four hours after the identification of his person.

4.... All cases of a similar type shall be tried by the USSR Supreme Court.

5.... The name of the outlawed person shall be communicated to all executive committees of the (local) Soviets and the agencies of the OGPU (secret police, now known as the NVKD).

6.... The present law shall have retroactive power.

Yet there are those who urge, practice, and carry guardedly into effect, their belief that American Courts and legislation can and should learn and gain much from the Soviet system of so-called law.

THAT STAR ATHLETES tend to become lawyers was the thesis of Royal Brougham, top sports columnist of the Seattle *Post-Intelligencer* in "The Morning After" for September 7, in which he extended hearty welcome to visiting lawyers and the "lot of prominent athletic personalities" in Seattle for the Association's Annual Meeting. Brougham went on to say:

Retiring President Tappan Gregory is one of America's greatest fishing authorities and a past president of the Izaak Walton League while Eddie Egan is a a former Olympic Games boxing champion and New York Boxing Commission chairman.

There is a sprinkling of ex-All American track, crew and football men here with the barristers, despite the rumor that all great football players major in auto repairing and sweeping up leaves on the campus lawn.

The legal profession has contributed mightily to athletics, including old persimmon-pussed Judge Landis, who cleaned up baseball with an iron hand.

Last time we saw Eddie Egan was in a pelting rainstorm in London several weeks ago, when we promised Lawyer Eddie a nice sunny week in Seattle when he came west with the disciples of Blackstone....

Egan has a soft spot in his heart for President Holman. A Rhodes scholar himself, it was the Seattle man who backed Egan for his Oxford scholarship, thereby affording Eddie his opportunity of cultivating an English accent.

To prove his point that many college athletes become lawyers, Brougham proceeded to pick an All-Lawyers football eleven from former players of the University of Washington alone, headed by the famed "Chuck" Carroll, now of the Seattle Bar, and declared that "the following imposing elevens could just about wallop a team of grads in any other profession you could name":

FIRST TEAM

Wee Coyle, Seattle	QB
Chuck Carroll, Seattle	HB
Mel Mucklestone, Chicago	HB
Bill Charleston, Seattle	FB
Warren Grimm, Centralia	E
Pete Husby, Everett	E
Polly Grimm, Centralia	T
Bill Grimm, Los Angeles	T
Jimmy Bryan, Bremerton	G
Ralph Nichols, Seattle	G
Pat Jessup, Bellingham	C

SECOND TEAM

Charley Smith, Seattle	QB
Irv Dailey, Everett	HB
George Guttormsen, Seattle	HB
Frank Griffith, Seattle	FB
Don Abel, Elma	E
Ben Ohnick, Manila	E
Jack Patton, Seattle	T
Zeke Clark, Seattle	T
Mike Hardy, Seattle	G
Bill Severyns, Seattle	G
Chalmers Walters, Yakima	C

RESERVES: Bob Abel, Tacoma; Squeek Hyndman, Hoquiam; Tom Alderson, Dode Brinker and Walter Wand, Seattle.

Columnist Brougham concluded his greeting:

So it's a right royal welcome to the legal profession. There is much kidding about ambulance chasers and keyhole operators among the barristers, but they are pretty important and necessary people for without newspaper lawyers, who would keep the Morning After editor from being jailed for libel?

Probably a dozen other States could list all-lawyer elevens which would give this All-Husky combination a tussle. And we think of fine lawyers who once were stars of college baseball, rowing, basketball, track, hockey and lacrosse.

IN THE SOVIET ARMY newspaper *Red Star*, according to the United Press on August 18, Professor S. A. Tokarev published an article of official significance, to the effect that there still is a survival of religious faith in the Soviet Union that must be stamped out by "systematic, scientific, anti-religious propaganda". This survival, he said, has resulted in "great harm to our cause, hampering the triumphal progress toward Communism. The struggle with various prejudices and superstitions is the most important task in the ... struggle for the triumph of Communism in the USSR".

Professor Tokarev restated the Soviet Union's constitutional provision, quoted and commented on in our editorial on the *McCollum* decision ("No Law But Our Own Prepossessions"?, 34 A.B.A.J. 482; June, 1948), for freedom of anti-religious propaganda, which he in effect argued should amount to "freedom *from* religion".

FREEDOM OF SILENCE, freedom to listen or not to listen—what Mr. Justice Frankfurter called "the precious freedom of privacy"—seems to be

finding a champion, and a possible means of still lawful protection, in the City of Los Angeles, despite the Supreme Court's decision unsettling the law and tearing down safeguards as to sound-trucks and loud-speakers at least for the duration of the present national campaign (see "Striking Down the Communities' Self-Protection"; 34 A. B. A. J. 589; July, 1948). Assistant City Attorney William H. Neal has advised the Los Angeles City Council that the Parks and Recreation Commission may lawfully be given power to set aside reasonably adequate public-speaking areas in some city parks and prohibit outright such invasion of privacy in other parks, areas and places. The idea may be worth trying in communities now suffering annoyances loosed by the Supreme Court's ruling. In the Lockport case, the city had set aside just such an area for public discourse with or without the aid of sound-trucks, but had specified that a permit be obtained from the chief of police for their use in other parts of the park.

IN THE SEATTLE *Post-Intelligencer* for September 16, Benjamin M. Levine of that city wrote under "Bouquet for the Bar" in "Voice of the People":

> The creative and constructive performance of the American Bar Association convention held in this city will have a lasting, beneficial effect on our city, State and nation, not only in its work well performed, but most important in the character and capacity of its membership.

CHIEF JUSTICE ROSSMAN, of the Supreme Court of Oregon (34 A.B.A.J. 364; May, 1948), as Chairman of the Section of Administrative Law, has announced supplemental rules as to manuscripts to be submitted in that Section's prize essay competition as to State administrative law (see announcement on page 971 of this issue). The supplemental rules are as follows:

> The rules regarding the contest are simple and require primarily that an entrant be a member in good standing of the American Bar Association and that he submit an essay, not previously published, on the administrative law of his State. Requirements as to length restrict the essay to 4000 words including quoted matter and citations in the text. Footnotes or notes following the essay need not be included in the 4000 word computation.
>
> The manuscript should be submitted in triplicate, typewritten, double-spaced (footnotes or notes following the essay, however, may be single-spaced), on one side of plain white paper, letter size (8½" x 11"), and mailed as first class matter, without folding, on or before December 31, 1948. The total number of words on each page of the text should be typed on the bottom of the page of at least one copy. There should be no identifying mark on any page of the essay manuscript. All copies of the manuscript should be sent to Miss Patricia H. Collins, Assistant Solicitor General's Office, Washington 25, D. C., with a cover sheet identifying the writer and his address with the title of the essay. The entry will then be assigned a number to be identified and recorded by Miss Collins, and the essay will be forwarded to the judges. After the winner has been chosen, the number of his entry will be certified and his identity revealed to the judges.

The Section committee in charge of the contest has appointed a local chairman in each State, whose function it will be to stimulate interest in the competition and supply contestants with needed information. The name of the local chairman in any State may be obtained from the chairman of the Section's committee, Omar C. Spencer, Yeon Building, Portland 4, Oregon.

THE SCHOOL OF LAW of the University of Southern California will conduct an Institute on Federal Taxation in its Auditorium on October 20-22, with three sessions daily. The Institute will be a forum where attorneys, accountants, executives and others interested in taxation can attend lectures on current problems in the tax field, enter into discussions and exchange information. The selected topics are of practical importance to tax practitioners, such as property settlement agreements and alimony in community property States; recent developments in family partnership law and other assignment of income problems; tax consequences of the taking of title by husband and wife in different types of co-ownership; the preparation of estate and gift tax returns and the administration of estates; tax fraud and voluntary disclosures; important differences in federal and State taxation of income; problems incident to the sale of a going business; recent developments of the business purpose doctrine in reorganizations and recapitalizations; income tax problems of the oil and motion picture industries; drafting a testamentary trust under the Revenue Act of 1948; and the responsibility of a tax practitioner to his clients.

Two evening panel sessions will be devoted to the taxation of life insurance used for business purposes, and the relative tax advantages of partnerships, corporations, and sole proprietorships. The final session will be a dinner at which Secretary of the Treasury John W. Snyder will speak. Other speakers outside the Los Angeles area include William A. Sutherland, Chairman of our Association's Section of Taxation, and Professor Stanley S. Surrey, formerly tax legislative counsel for the Treasury Department.

A SUCCINCT STATEMENT of a considered view which needs to be taken into account in present-day American discussions, although not to be utilized as shield for the covert and the guilty, is contained in the statement issued from an institute recently held in St. Louis on "Judaism and Civil Rights":

> The government has a proper concern for the loyalty of its employees, and a grave concern where strategic positions are involved. In administering a program to assure such loyalty, however, it is essential that certain safeguards be scrupulously observed: (a) There must be no identification of unconventional or unpopular opinions with disloyalty; (b) Guilt by association must not be recognized as sufficient; (c) The procedures must give the greatest, not the least, possible protection to the employee. We are entitled to loyal public servants; but in the effort to discover those few who may not be such, we must not destroy the morale and the spiritual and intellectual freedom of the great body of devoted government workers. Government is the great exemplar in our society, and can provide a model of fairness or of ruthlessness.

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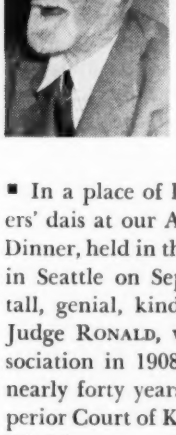
Lawyers *in the News*



James T. RONALD

■ In a place of honor on the speakers' dais at our Association's Annual Dinner, held in the Civic Auditorium in Seattle on September 9, was the tall, genial, kindly, gaunt figure of Judge RONALD, who joined our Association in 1908, who has been for nearly forty years a judge of the Superior Court of King County, State of Washington, and now in his ninety-fourth year is reputed to be the oldest State Court judge in active service anywhere in the United States. He has held this seniority since October of 1943, when took place the death of his friend, Judge W. J. Kneeshaw, of North Dakota, at the age of eighty-nine. Among federal judges, the oldest in active service is United States District Judge Tillman D. Johnson, of Salt Lake City, Utah, whose age is ninety (see 34 A.B.A.J. 136; February, 1948).

Not only is Judge RONALD continuing to fulfill his duties on the bench, but in the September 14 primary he polled more than twice the votes obtained by any candidate against him for Position No. 8 on the ballot for Superior Court judge. Had he polled a majority over all opponents, he would thereby have been elected, under Washington's nonpartisan system for nominating and electing judges. He and his next-ranking opponent will contest for the place at the November election.

We take the space here to tell something of the career of this rugged jurist, because it typifies the experiences of lawyers of earlier generations in blazing the trails for our profession today—experience which our younger lawyers should never forget in this era when their difficulties are at least different.

Born in April of 1855 to Scotch-Irish parents on a farm at Caledonia, Washington County, in the Ozark Mountains of Missouri, sixty miles south of St. Louis, RONALD worked on a farm until he went at the age of eighteen to the North Missouri Normal School from which he was graduated two years later. With $150 which he borrowed from an uncle, he set out for California by way of Omaha, on an emigrant train early in July of 1875. After difficulty in finding a job as a teacher in California and with only fifteen cents to his name, he was hired in a mountain school in Danestown, Placer County, California, to receive $475 for eight months with the privilege of boarding at various farm houses without cost to him. On July 4, 1875, he borrowed a copy of Blackstone and began reading law. In 1877 he sent for Rhoda Coe, his boyhood sweetheart in the Ozarks, and they were married. He studied law in the evenings, and in 1882 he was admitted to the Bar of California, having meanwhile succeeded to the position of principal of the elementary school in the town of Lincoln in Placer County.

From a traveling evangelist, RONALD heard of the beauty and prospects of a little village known as Seattle, on Puget Sound, and he determined to seek his fortunes there. In the summer of 1882, he and his wife and child embarked on the packet steamer *George W. Elder* for the six-day voyage to Seattle, then a town of 4300 people with forty-four lawyers. There he formed a law partnership with W. D. Wood, another newcomer. They rented space in a real estate office and tried to eke out a living by selling lots and practicing law on the side. Their total receipts for the first month were $2.50, and Wood withdrew from the firm. RONALD stayed on, sold an occasional lot, tried an infrequent case before a justice of the peace and kept books for a meat market for $20 a month and his meat bill. Seattle was then "a tough town". Judge RONALD says of the era: "When I was appointed deputy prosecutor in 1883, I declared war on panderers and plug uglies. They threatened to get me, and on one occasion did poison me; but I got well and went after them harder than ever."

In 1885 he was made district attorney for King, Kitsap and Snohomish Counties, at a salary of $75 per month with additional compensation so that the total was $125. He formed a law partnership with Samuel H. Piles, later United States Senator and Minister to Colombia; they built up a lucrative practice. RONALD was elected mayor of Seattle in 1892. He says: "I served 102 years as mayor. It really was only two calendar years, but it seemed like 102 long, bitter years." Many oldtimers recall RONALD as Seattle's tallest lawyer; he was often in hot legal battles with Judge Burke, who was Seattle's shortest.

RONALD's next law partnership was with Judge Richard A. Ballinger, later Secretary of the Interior under President Taft, Alfred Battle and Robert Hurlbert. In 1900 RONALD lead the Democratic ticket as its candidate for Congress, but it was in a period when any Democrat in Seattle was doomed to defeat. RONALD served for several years as regent of the University of Washington and several more years as a member of the Seattle School Board. In 1907 he

and his wife made what he believes to have been the second trip which anyone made by automobile from Seattle to San Francisco. It was in his new "White Steamer", and took twenty-one days. He was one of the leaders in the good-roads movement, and was in 1908 the president of the Seattle Automobile Club.

In 1909 RONALD was appointed a judge of the King County Superior Court, by a Republican Governor. He has ever since been re-elected whenever his term expired, and has devoted himself conscientiously and capably to his judicial work despite advancing years.

When he was ill for a month in 1939, he held Court at times in the apartment in which he has lived in a downtown hotel since the death of his wife in 1923. In 1941, the attorneys for both sides in a case on trial before him offered to take him, then eighty-six years old, to the place of an accident at 6th Avenue West and West Garfield Street in Seattle, so he could familiarize himself with the accident scene before ruling on any questions arising. "I thank you gentlemen for your offer," he replied, "but there is no need of my going out there. You see, I cut the first tree felled in that district to build a house —my own home."

In October of 1941, in an address to law graduates being sworn in as members of the Bar, Judge RONALD referred to the fact that he had already lived in the administration of eighteen of the country's thirty-one Presidents, and declared that false doctrines and "isms" were not the real menace to the nation but that a spirit of "growing intolerance" constituted a grave danger to the American way of life. "I have no fear of any doctrine so long as reason is left free to combat it." When he became a great-grandfather in 1938 for the sixth time he wrote a poem of forty lines to commemorate the event, and added: "I expect to live to see that baby married and give me a great, great grandchild."

Judge RONALD has repeatedly declared his hope and purpose "to remain on the bench just as long as I can faithfully perform the duties assigned to me". In 1945, on the occasion of his ninetieth birthday, he said:

> The gods have been pretty good to me and I know that. According to the nature of things, I can't last many years longer but I am looking forward. The older I grow the more I am anxious to find pleasure doing something useful. . . . All I want is to stay on the bench so long as I can do my share. When I can't carry my end of the load I am through.

There is a story, perhaps apocryphal, of that occasion. Some of his friends of the bench and Bar went back to the records of a complicated case which was one of the first he had tried and decided, then more than thirty-five years before. For his entrapment, they took the essential facts, dressed them up in a very different setting, and gave him a statement of the case, to see if he would decide it the same way. He quickly recognized the case and the issue despite the disguise, decided it the same way as he had done before, and cited his own prior ruling as authority on the point.

Henry Anderson
FENN

■ The University of Florida's flourishing College of Law has a new Dean this fall—an experienced teacher of law who has had good experience also in the active practice of law, one whose fidelity has been proven to be to the all-around education and training of law students primarily to take their places effectively in the work of law offices and then to fulfill their part as good citizens in politics and public affairs from the vantage point of their standing as lawyers in their home communities.

FENN was born in St. Joseph, Missouri, in 1909, where his father was a Y.M.C.A. secretary-director. He is a nephew of Colonel Henry W. Anderson, of the Virginia Bar (Richmond), a nationally-known lawyer who formerly was one of the receivers for the Seaboard Airline Railroad, and now chairman of the board of the Seaboard.

FENN'S family moved to Norfolk, Virginia, where he was graduated from Maury high school—later from Phillips Academy at Andover, Massachusetts, in 1928; Yale University (B.A. with orations) in 1932; and Yale Law School in 1935. He then entered the office of Larkin, Rathbone and Perry, in New York City, and was associated with that firm until 1941, having been admitted to the New York Bar in 1938.

In 1941 FENN returned to Yale for graduate work in the Law School, preparatory to teaching and administration. The following year he became Assistant Dean of the Yale Law School, which post he held until last year. Successively he was also an instructor (1942-44), assistant professor (1944-45), and associate professor (1945-48). In those capacities he taught courses in wills, trusts and gifts; administration of decedents', and trust estates; legal research; and legal profession. He earned and held the respect and regard of his students because of the practical quality of his teaching.

Karsh

Louis Stephen
ST. LAURENT

■ One of the foremost lawyers of Canada, a former President of the Canadian Bar Association, a staunch champion of cooperation between the lawyers of Canada and the United States, has been chosen by the National Conference of the Liberal Party in power as its new leader and before the end of the year, probably in November, will become the

Prime Minister and head of the Canadian government under its parliamentary system.

Prime Minister W. L. MacKenzie King, who is retiring after an unprecedented tenure in the post, has gone to Paris to head the Canadian delegation in the momentous meeting of the General Assembly. This leaves ST. LAURENT, now Minister of External Affairs in the King Government, as its acting head as well as leader of the Liberal Party. When King returns, the 66-year-old former corporation lawyer will take the reins.

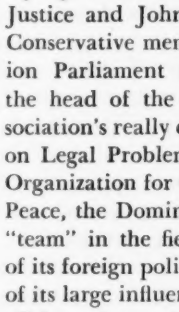
Born of a French-Canadian father and an Irish-Canadian mother, ST. LAURENT personifies Canada's bilingual citizenship; he was chosen as the best man to hold together a dynamic, growing nation of diverse racial, religious and sectional viewpoints and interests. "Unity, Security, Freedom" was the chosen keynote of the party convention which selected ST. LAURENT. He is no stranger to American lawyers, having had much contact with them during his days at the Bar, having attended and addressed the Annual Meeting of our Association in Chicago in 1930, and having worked in friendly fashion with our Association's representatives during the San Francisco Conference of the United Nations and during meetings of the General Assembly at Lake Success, Long Island, where he headed and led the Canadian delegation.

Courtly, scholarly, grey-haired, brown-eyed, ST. LAURENT has great personal charm and speaks eloquently in French or in English. The son of the keeper of a country general store in Quebec province, he is in religion a Roman Catholic and in social philosophy the leader of the right wing of the Liberal Party, an outspoken foe of Communism and of Russian aggression and at least a skeptic as to socialization, although he has supported social security measures. He will be Canada's second French-Canadian Prime Minister, successor to the tradition of the great Sir Wilfrid Laurier. "I see no reason why the French and English shouldn't get along well together in Canada," he said, on taking the party leadership. The Dominion has 4,000,000 French-speaking citizens and 8,000,000 English-speaking citizens, with a lot of other races thrown in for good admixture. ST. LAURENT's internal problems may be delicate and difficult, as many of his French fellow-citizens believe the British get the breaks.

A more detailed sketch of ST. LAURENT's career was in 33 A.B.A.J. 488; May, 1947. We have always liked what he once said about his childhood experience with bi-lingualism in his home. He said that he knew nothing about divisions or differences in races and languages. "I thought there was one way in which fathers were spoken to and another way in which mothers were spoken to."

As head of the Canadian government, ST. LAURENT is expected to continue the policies which marked his service as Minister of External Affairs (Secretary of State). He has worked for revival and expansion of Canada's trade with the United Kingdom and for a better economic and trade balance with the United States. A zealous nationalist, he would oppose any steps that might undermine the independent action of Canada as a nation, with the United States or in the British Commonwealth of Nations. He favors an Atlantic Union or an association for collective security, among the nations of the Americas, but within the frame-work of the United Nations, to which he is staunchly devoted. "The best guaranty of peace today," he has lately said, "is the creation and preservation by the nations of the free world, under the leadership of Great Britain, the United States and France, of an overwhelming preponderance of force over an adversary or possible combination of adversaries."

ST. LAURENT's successor as Minister of External Affairs is the popular, experienced and capable Lester W. ("Mike") Pearson, who has made a most favorable impression in representing Canada in Washington and in the councils of the United Nations. With John Reed, of Canada, a judge of the International Court of Justice and John T. Hackett, able Conservative member of the Dominion Parliament from Montreal at the head of the Canadian Bar Association's really eminent Committee on Legal Problems of International Organization for the Maintenance of Peace, the Dominion has a first-class "team" in the field for the shaping of its foreign policy and the wielding of its large influence in international affairs, always in the interests of peace and law and resistance to the aggressions of Russian Communism.



Blackstone Studios

Ollie Roscoe McGUIRE

■ A stalwart veteran of our Association's earlier wars to end or curb the abuses inherent in federal bureaucracy and administrative absolutism attended our Seattle meeting and delivered a vigorous address before the Section of Mineral Law, in which he described and denounced "the devastating exercise of federal power by present-day bureaucracy" and placed much of the responsibility for it on the present-day Supreme Court. MCGUIRE, who is a member of the District of Columbia and Virginia Bars and lives in Arlington, Virginia, became a member of our Association in 1925.

He was born in Kentucky in 1892, and attended Louisiana State University and obtained his degree in law at George Washington University in 1919. He served over twenty years in the federal government as law clerk to the Comptroller of the Treasury, attorney and counsel to the Comptroller General of the United States and special assistant to several Attorneys General of the United States, and then resigned to practice law and take up the cudgels

against abuses which he saw increasing rapidly in the fast-multiplying federal agencies. To that end McGUIRE became in 1935 the chairman of our Association's Special Committee on Administrative Law. Thereafter, until 1941, he was in the thick of the fight, as chairman or member of the Committee. Legislation was drafted under our Association's auspices and urged upon the Congress, against fierce resistance from those who were building or benefiting by the bureaucratic system. The Walter-Logan bill emerged, and McGUIRE and others of his Committee spoke before many Bar Associations in support of it. Opinion of the profession and the public was aroused in favor of its enactment. When the Congress passed it in 1940, President Roosevelt vetoed it. The Attorney General's Committee on Administrative Procedure was created, to take up the problems of remedies from somewhat different angles. In that Committee, Carl McFarland, Arthur T. Vanderbilt, E. Blythe Stason, and Judge D. Lawrence Groner, came forward as a militant minority whose proposals won favor in our Association and eventually in the Congress, when embodied and fortified in the McCarran-Sumners bill which became law in 1946 as the Administrative Procedure Act.

McGUIRE was not in official position in our Association in the hour when the struggle in which he had taken the lead was carried to its first large measure of victory; but his voice of protest against the abuses has never been silent, and on September 7 he was on hand to point out that the need for further measures to curb and end the evils of bureaucracy still exists and continually increases. As a staunch fighter in the cause of justice, fair play, and the rights of men and their property against arbitrary administrative action, he was warmly greeted and heartily applauded in Seattle for his forthright utterances. "We may thank the Supreme Court of the United States for the devastating exercise of federal power by present-day bureaucracy, much of it in behalf of minority groups," he asserted.

His delineation of what he sees as taking place around him in Washington today was explicit and pulled no punches:

> We have 500,000 more employees of the federal government today than we had at the peak of the last World War. We have almost confiscatory taxation; so high, in fact, that even those of moderate incomes work from three to four days a month for the federal government, to say nothing of the taxes which they must pay to state and local governments.
>
> We have a President refusing access to the elected representatives of the people to the personnel records of some public employees whose loyalty is seriously questioned, and we have legislation approved by the Supreme Court of the United States in most recent years which we have hitherto believed to be beyond any power conferred on the federal government.
>
> In fact, we have a campaign now being waged for the Presidency of the United States, for all members of the House of Representatives and for one-third of the Senate, on party platforms which promise further benefits to minority groups, with correspondingly heavier burdens for vast numbers of American citizens, particularly those who have accumulated some wealth or who have been reasonably successful in their careers.
>
> This is not the place nor the occasion for the making of a political speech, but it is a place and occasion for plain speaking.
>
> And I ask you, in all earnestness, where is the difference between Caesar furnishing the Romans with bread and circuses, by means of taxes laid upon the populations under his rule, and the promise of a candidate for the Presidency of the United States to minority groups to furnish them with medical and hospital services, to pay them higher old age pensions and to secure for them greater wages?
>
> Since no politician can make money grow on trees, these promises can be redeemed only at the expense of property owners in the United States. Also, there are none so stupid as not to know that the so-called Marshall and other plans for foreign aid are at the expense of the taxpayers, including wage earners, of the United States.
>
> Where, I ask you, my fellow lawyers, is there power conferred in the federal Constitution or in any of its amendments for the taking of your property and giving it to the less fortunate, either in the United States or in the world?

Alex M. CAMPBELL

Allen C. Lomont

■ The new Assistant Attorney General of the United States in charge of the Criminal Division of the Department of Justice throughout the United States is the Indiana lawyer (Fort Wayne) who has been United States Attorney for the Northern District of Indiana since March of 1941. CAMPBELL, a member of our Association since 1944, was given a recess appointment by the President on on August 13, and took the oath of office at once, because of the pendency of many important cases of which he will have charge, including the trial of the indictments returned against "top" Communist officers in New York City.

CAMPBELL was born in 1907 in Coldwater, Ohio, but attended the public schools in Fort Wayne, Indiana, and Olivet College (pre-law) in Michigan. He is a great-great-nephew of Alexander Campbell, a religious leader early in the last century, who founded the Disciples of Christ, to which faith the new Assistant Attorney General adheres. He was graduated from Indiana University Law School in 1930 as president of his law school class and several other student organizations. Admitted to the Indiana Bar in 1929, he began the practice of law in Fort Wayne in 1930 and became the Democratic Chairman for Allen County in 1934. From 1935 to 1941 he was Assistant United States Attorney under James R. Fleming, and was appointed United States Attorney by President Roosevelt in 1941 and reappointed by President Truman in 1946.

Since he took office, the criminal business of the district has increased about four times; with nearly 5000 complaints of which nearly 3000

have been placed before federal grand juries; and CAMPBELL has handled many conspicuous cases. Attorney General Tom Clark said he did a "tremendous job" as United States Attorney in "black market", OPA violations, draft evasions, conscientious objector, Jehovah's Witnesses, German-American Bund, and other notable prosecutions. His friends expect his capacities as a rugged and experienced trial lawyer will enable this member of our Association to make good in his new post.

Robert F. MAGUIRE

Kay Hart

■ In its April, 1948, issue (34 A.B.A.J. 310) the JOURNAL published in this department a sketch of Judge Charles F. Wennerstrum, of the Supreme Court of Iowa, and quoted from interviews which he issued, at Nuremberg, Germany, and upon his return to the United States, concerning proceedings had by and before Tribunal IV of the International Military Tribunal for the trial of Germans accused of war crimes. In that connection, the following statement was made, based upon supposedly factual dispatches which appeared in newspapers at that time:

> Army and prosecution tactics, condemned by the Iowa jurist as contrary to American concepts of fair play, were reported to have been criticized later by the tribunal of which Judge Hu C. Anderson, of Tennessee, and Robert F. Maguire, of Oregon and our House of Delegates, are members.

Despite his natural aversion to engaging in any public controversy while he is on the bench of the Military Tribunal, Robert F. MAGUIRE, active member of our Association since 1930 and long a member of the House of Delegates (34 A.B.A.J. 42; January, 1948), has written to the Editor-in-Chief of the JOURNAL to correct in the minds of our readers what he regards as "so clear an error". Mr. MAGUIRE says:

> The statement that either Tribunal IV of which I am a member or that I personally criticized Army or prosecution tactics as contrary to American concepts of fair play is wholly without foundation in fact. Not only did such an incident not occur but nothing has transpired that would warrant any such intimation. The tactics of the prosecution in our case have been eminently fair; every facility has been granted the defendants to prepare and present their cases; the relations between the defense counsel and the prosecution have at all times been courteous and cordial and in conformity with the highest standards of ethics. Such has been what I have personally observed, and I might say that I have never heard any suggestion from the members of any other Tribunal that the tactics of either the prosecution or of the Army in any of these cases has been improper or contrary to our concept of fair play and justice.
>
> The interview which Judge Wennerstrum gave after he had concluded the case on which he sat came as a complete surprise to the members of the bench in Nuremberg. My only interest in writing this letter is that the JOURNAL may correct a statement which had no foundation in fact.

We are indeed glad to give to Mr. MAGUIRE's earnest statement the same place and prominence which we gave to the statement to which he takes exception. This is done in fairness to him and to Judge Anderson, and also to those lawyers who, in behalf of the United States Army, have labored long and patriotically in their discharge of duties before the Military Tribunals. ■

Rank and File of People Are Searching for a Sound Philosophy About Government

■ The free air of political liberty was gained for our modern world in the eighteenth and nineteenth centuries. During those centuries the churchman, whose thought had dominated the Middle Ages, gave way to the political philosopher; and he in turn yielded to the scientist. Today the scientist is awakening to a new conception of philosophy. Great physicists are discussing the danger of dogmatism in science as earnestly as they do the cosmic ray, and are seeking the relation of science to human welfare. Not only are leading minds searching for sound principles, but the rank and file of the people show an interest in government, in philosophy, and in education which is new and significant. The people in their turn are becoming philosophers.

—From *This Constitution of Ours*, by Judge Florence E. Allen. New York: G. P. Putnam's Sons. 1940.

"Books for Lawyers"

BLACKSTONE AND WHITE ROCK. *By Milton Farber. New York: E. P. Dutton and Company. 1948. $2.75. Pages 213.*

Milton Farber's *Blackstone and White Rock* suggests in its title a literary highball with a legalistic kick to it. Many lawyers will find misplaced "bitters" in this autobiographical concoction.

It is evident that in the "White House" barroom, or at a stag party, or even in an ordinary living room with sophisticated and seasoned adults of both sexes present, Farber would regale his audience with autobiographical anecdote after anecdote, stimulate guffaws of laughter, and justifiably take the spot-light as an entertaining and unforgettable raconteur. One can well assume that Farber's hosts of admiring friends, in profound sincerity, would often say, "Milton, you ought to write a book about your wonderful experiences as a lawyer and let others read what you have permitted us to hear." Whatever other justification the publication of this book may have, it is undoubtedly at least a surrender by Farber to the repeated suggestions of flattering friends.

To the critical reader the admissions in the preface are disarming. Farber acknowledges that his life "has not been one of monumental significance or even of universal interest". He seems to exult in the circumstance (which one suspects is not accurate) that his clients "have all been men of little importance", and that the message of the book "has no social significance". After twenty years at the Bar with "Blackstone and White Rock", he frankly concedes that he has "accomplished nothing which might in any remote sense be considered memorable". Then, to prove the truth of his prefatory observations, he proceeds for more than 200 pages with tidbits that reflect the small change of the average lawyer's human, professional experiences.

One recalls the less justifiable but somewhat similar modesty and frankness reflected by Alfred Nobel. He was once asked to write his autobiography. He confined it to the length of a telegram—seventy-two words. It included a reference to his principal virtues, his principal faults, his only wish, his greatest sin, and was climaxed with the "important events in his life" which he listed as "none". There was an apparent consistency with the thought which Nobel sought to convey by the brevity of the style he adopted, even though his modesty may have been false.

However, it is evident that while Farber grants that the professional events of his life were neither of "monumental significance" nor "memorable", they were nevertheless important, at least to him, and sufficiently so to write a book.

Some lawyers and lay persons may find the book entertaining. Some will find many passages in bad taste and needlessly bold. Some will find the "gamey" jokes reminiscent of old "Joe Miller's". Some will find the philosophical observations trite and unoriginal. Some will find Farber's recorded professional experiences, including those of Justice Ankrom, "sordid and trivial".

The story of "the case of the non-piddling dog" is well told and presented entertainingly, but a reader would have to be pathetically naive to believe the anecdote as an actual experience in its literal presentation. In spite of Farber's extravagant warranty that the book "is the most complete and truthful autobiography ever written", his tongue must have been in his cheek and a mischievous twinkle in his eye, when he wrote for the benefit of his fellow members of the Bar and others, that he actually prepared a petition to be filed in the Court on behalf of man's best friend, a dog, particularly the dog who suffered from retention and distention, and in which petition the dog, as the individual plaintiff, was to seek damages from a truck owner for alleged negligence in causing the condition from which the dog was suffering. What kind of a person or legal entity qualified to be a litigant, even in the State of Ohio, is a "non-piddling dog", or for that matter, any dog on four legs?

A few readers will find their prejudices against lawyers and the administration of justice in general rendered more inveterate by the collateral or incidental and seemingly "incompetent, irrelevant and immaterial" polemics in the book. Farber's diatribes against the legal profession as a whole, and his presentation of the weaknesses, foibles and practices of individual lawyers, coming from a writer who is himself a lawyer, will have a tendency to arouse or confirm suspicions and distrust of lawyers in general, rather than inspire confidence and respect. It is not difficult to tear down public esteem for a large group by presenting an alleged stereotype with unworthy qualities, even though such unworthy qualities may be possessed by relatively few in the larger group. Has the legal profession ever lived down the bad reputation established by the unethical lawyers who have appeared in fiction and drama?

Few will find anything in the book which enriches the mind or increases its treasure, or causes it to advance

a single step.

While Farber has a breezy style, with a wide choice of words and phrases, reflecting at times scholarly information, impregnated with wit and humor, at times rather lusty, the book is not "broad and great, refined and sensible, sane and beautiful, in itself". These are the qualities which, according to Sainte-Beuve, a classic should possess. Farber readily avows that if such similar qualities are found to be present in his book, they were not "intentionally deposited" therein.

Alas, *Blackstone and White Rock* is not likely to be regarded as a classic. Even Farber will probably be the first to proclaim that while most great men and great lawyers are witty, yet all great wits, even witty lawyers who write autobiographies, are not great men or great lawyers.

NAT SCHUMLOWITZ
San Francisco, California

EDITOR'S NOTE: Our reviewer sent to Author Farber a copy of his review of *Blackstone and White Rock*. The author immediately wrote and sent to us a spirited reply to some of Mr. Schmulowitz's strictures. Because the review and the reply, as well as the book, may add to gaiety of the spirit, we publish Mr. Farber's answer in "Views of Our Readers" where it should be read in conjunction with the review.

PERSUADE OR PERISH. *By Wallace Carroll. Boston: Houghton, Mifflin and Company. 1948. $4.00. Pages 392.*

A seasoned reporter who covered stirring events of peace and war in Europe from 1929 to 1941 for the United Press, who next had a high post in directing "psychological warfare" for the United States in the European theater from 1942 to 1944, and finally was in Washington to direct the planning of American "psychological warfare" operations on the whole continent of Europe, has called on his experience to write this exposition of the new conflict —the tense "cold war"—which began when hostilities ended in World War II. Its purpose is to inform and arouse Americans to a realization of what they need to do to avert defeat in this warfare waged with propaganda, politics, intrigue, rumor campaign and intimidation, and to avert also the devastating holocaust of a third war.

As background Carroll sketches brilliantly and in graphic detail the manner and instances in which the United States exposed itself needlessly and weakly to propaganda attacks, in turn by the Nazis, the Russians and the Communists of all Europe—three kindred manifestations of totalitarian aggression. He shows also how our own mistakes and ineptitude have aided the Soviet Union and its satellites in weakening the solidarity which normally would have continued to exist between the United States and the other free peoples who had rallied to the cause of the Allies during World War II. The totalitarian "strategy of confusion" and turmoil, stirred successively in one country after another by agents or followers of the Kremlin, has thus far availed to weaken, if not impair, what should have been indissoluble links of amity and common defence between the free peoples of the world.

At a time when indecision and drifting appear to have ended, in Britain as well as in Canada and the United States, and the leaders of nations are facing grim responsibilities of irrevocable decisions, Carroll offers a constructive "strategy of persuasion" to supplement and build on the Marshall Plan and hold the free nations together for peace and law. He writes earnestly, poignantly because he has seen at first hand the stark realities; he is objective, realistic, specific because that is his habit of mind and work and because he knows that generalities are dangerously insufficient when time is running out. That America must exemplify the antithesis to the hard, unyielding brutality of Marxism made mad by Cossack greed for power, and then must overcome all obstacles to persuade the world that the paths of freedom, constitutionalism, and justice under law are the only roads to peace and survival, is the thesis for which he gives blueprints and specifications for accomplishing such ends—"persuade or perish" seems to him to be today's inexorable choice of our people in every part of the United States. Decisions as to leaders, policies, legislative measures, and the over-all tone of our public opinion and its objectives, need to be made according to the test as to what and who will best carry forward that task of unification, exemplification and persuasion.

W. L. R.

THE DEVELOPMENT OF THE SOVIET ECONOMIC SYSTEM. *By Alexander Baykov. New York: The Macmillan Company (also the Cambridge University Press). 1948. $6.00. Pages 514.*

This work is the crowning fruition of a mature life-time study of its subject. It is the most carefully documented economic history of the USSR from 1917 to 1940 which has so far appeared in English. Alexander Baykov has made a prodigious attempt to present a comprehensive and detailed scholarly work on a complex subject in the field of social science.

A Russian by birth, Professor Baykov left the USSR in 1920 and continued his economic research in his chosen field at the Prague University, where he was associated with Professor S. N. Prokopovicz, editor of the then *Quarterly Bulletin of Soviet Russian Economics*, which appeared, in Russian, in Prague until 1939 and for another year in Geneva. Since 1945, Baykov has been lecturer in charge of the Department of Economics and Institutions of the USSR at Birmingham University, England.

The book is divided into four sections according to four stages of economic development in the USSR: (1) War Communism; (2) National Economic Policy (NEP); (3) Five Year Plans and Collectivization; and (4) Abolition of Rationing and Reconstruction. Under each period the main branches of the planned economic system are treated in their relation to each other—in contrast to

most works which outline each branch separately throughout the entire period. It is Professor Baykov's contention that in each of these periods the stress was placed on one branch of economic life which influenced legislation in all the other branches. The introduction of the fourth stage, "Social and Economic Improvement from 1934 to the Outbreak of War", is of current interest to the serious student, both for its panegyrics and basic omissions. About half of the book is devoted to this period.

In his efforts to be "objective" and "authoritative", Baykov explains the development of the Soviet economic system in definitive terms and in categorical observations that are neither justified by the author's own select data nor by the generally recognized paucity of available official information. The author seems to gloss over the fact that from the very beginning of its existence to date, the Soviet system has been geared to a war economy. Moreover, by the Kremlin's own admission the forthcoming five-year plans are postulated on the premise that the Russian national economy will continue to be geared to a war economy (see review of the book by Nickolai N. Voznesensky in 34 A.B.A.J. 491; June, 1948) and that the Communist Party will remain the vanguard of the monolithic state.

The totalitarian-planned economy as it has developed in the USSR and as it is currently being effectuated in the "new peoples' democracies"—the nine Russian satellite countries comprising the Soviet orbit in Europe—is by its very nature a wartime economy. This constitutes the core and kernel of the "intrinsic strengths" of the Soviet system and that is one of the basic reasons why there is no unemployment in any planned system. The labor laws (decrees) promulgated in October of 1940 and forced labor camps are still integral parts of the Soviet Russian national economy in 1948.

Baykov's book is of interest to lawyers because the legal system in the USSR is still largely a structure of government by decree. Lawyers and political scientists are called upon to draft legislation, to interpret the regulations in pursuance thereof and to devise techniques to administer the decrees and directives. There has accumulated already a body of Soviet administrative law which is still in the process of growth. In translating many of these decrees (laws), or substantial parts thereof, Baykov has rendered a valuable service to American and British students of the Soviet-politico-economic system. But, like other chapters in the book, there is a conspicuous absence of analysis and appraisal of the effectiveness of government by and of decrees.

Likewise, the author chose *not* to analyze the philosophy and methodology of the complex cost accounting system bearing on profits and administrative efficiency of government trusts and corporations. Obviously, Soviet Russian newspapers, especially the provincial press, are replete with daily reports covering disputes within, between and among trusts and government corporations and local enterprises and charges of gross mismanagement. Yet Professor Baykov gives practically no account of the part played by the government (state) arbitration system; nor does he explain the variegated treatment given to these legal entities.

This reviewer has hoped that this truly scholarly work would present a balanced and relatively comprehensive analysis of the development of the Soviet economic system. Unfortunately it falls seriously short of its expectations; consequently it will probably not be used as a basic textbook, but it will undoubtedly be in constant use as a standard work of reference.

Professor Baykov makes extensive use of Soviet economic data and statistics, but fails to present a careful evaluation of his own irreconcilable contradictions and does not always account for the official withholding of basic information. Occasionally the author warns the reader that the experience of planning in the USSR must needs be viewed with misgivings (page 399):

> Unfortunately, figures for the USSR national income are published only in the fixed prices of 1926-7, whilst budget data are published in current prices, and moreover, since 1931, no price indexes have been forthcoming from Soviet sources. It is impossible therefore to estimate the share of the national income which passes through the channels of the budget system. However, the ever-increasing importance of the State Budget as redistributor of the national income can be surmised from a comparison of the figures in Table 64, which show the growth of the national income and that of the combined budget of the USSR.

Granted, Table 64 summarizes state budget appropriations for the years 1935, 1936, and 1937. Like many another exacting student of the Soviet Russian scene, Professor Baykov knows that up to 1938 the income from and the expenditures on social insurance were not included in the state budget. But to the average graduate students many of the tables and other data recorded in the book would be misleading because they are not placed within the proper perspective nor in cognate relationship to other imponderable factors.

Professor Baykov contends that his book is not a history of the development of the economic system of the USSR but only "an historical introduction to the description of the present-day system in its principal aspects and problems". Yet the historical approach is the dominant theme throughout the book. Moreover, the non-seasoned reader might be misled by the over-all impression of this study, because the 1948 American edition is reprinted from the first British edition of 1946. Actually the data cover the period 1917-1940 and the paucity of analysis stops even earlier. Acordingly, the basic social and economic forces that were at play and which led to the profound monetary reform of December 14, 1947, are not discernible nor foreseen even by implication.

The concluding chapter on "General Planning" is perhaps the only part of the book devoted to an analysis of the development of the Soviet

economic system. Therefore, it is all the more regrettable that the author does not delineate the basic distinction between planning in a rigidly controlled, totalitarian economy and planning in a relatively free-enterprise economy. After all, there is a whale of a difference between the planning surrounding the Federal Reserve System in the United States and that of the State Bank of the USSR.

In his preface, the author apologizes for the faulty English of this book. This is due to the fact that parts of the manuscript were written in Russian and translated into English, whereas Chapters I-VI were written originally in English. The result is not a very readable book. But this failing is compensated by the positive and constructive descriptions of the Soviet planned economic system, especially since the book is replete with relevant data hitherto unavailable in English.

The relative strengths, weaknesses and the mistakes of the free enterprise system, where the economic motives are the strongest, have been transformed into a planned economy where the political and military factors dominate the scene. But, curiously enough, fundamental human, social and psychological incentives have remained paramount in the Soviet planned economic system, parallel to those in the American capitalist society. Soviet economists recognize these basic social forces at play and are prone to give due consideration to this phenomenon, whereas Professor Baykov seems to gloss over these factors entirely. Nevertheless the book under review will in all probability remain a standard treatise on the Soviet economic system, its basic omissions notwithstanding.

CHARLES PRINCE
New York City

CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER. *By George H. Dession. Charlottesville, Virginia: Michie Casebook Corporation, 1948. $8.75. Pages 1081.*

In our complex, modern industrial urban society, criminal law is expanding into new fields as regulation of more and more activities is undertaken by government, both federal and State. For many years most lawyers did not think it necessary to concern themselves about criminal practice. In fact, they have not considered violators of regulatory statutes, such as anti-trust laws or labor laws, as in the same class with those participating in common law offenses covered in the usual criminal codes. However, as Professor Dession points out in the preface to his new book, regardless of whether one considers it as the practice of criminal law, nevertheless practice in the regulatory field now requires "the same familiarity with criminal procedure and the same grasp of fundamental substantive criminal law conceptions as the traditional criminal practice". Consequently, law students who hope to serve corporate clients have an added incentive to study criminal law.

The new volume is a casebook; it fully covers with well-selected cases the usual subjects of criminal law and procedure. It also contains illustrative criminal statutes and many of the new Federal Rules of Criminal Procedure. The author was a member of the Supreme Court's Advisory Committee which drafted those rules. His book contains also numerous annotations which show variations in the basic concept of the legal systems of Western Europe and Soviet Russia, to afford a comparative view of the law of the United States. It is pointed out that the recent war crimes trials and the organization of the United Nations show the need for lawyers of the different countries of the world to meet the problem of understanding one another, particularly in the atomic age we are entering.

Professor Dession seeks consideration for a new approach to the problem of the use of criminal sanctions as a means for maintenance of the public order by placing the emphasis on producing a net gain to individuals involved and to society. The idea that there should be a fixed punishment (in terms of years) to fit every crime has tended to make the offender think of the penalty as a debt he must pay to society and to consider committing another crime on the basis of whether it might be worth the price if he were caught. A more enlightened viewpoint is punishment to fit the criminal rather than the crime; this is the purpose of parole laws, indeterminate sentence laws, and other provisions for varying the treatment of different individuals. Materials on this subject are included in the book, and there is also a comprehensive section for study of the work of police officers and public prosecutors. The book seems well designed to cover the field of criminal law and its administration and practice from a modern and forward-looking point of view.

LAURANCE M. HYDE
Jefferson City, Missouri

STREET'S MORTUARY JURISPRUDENCE. *By Arthur L. H. Street. New York: Kates-Boyleston Publications. 1948. $6.00. Pages xviii, 229.*

Here is a vocational variation from such diversions as danse macabre, the Marcia Funebre of the *Eroica*, "Alas poor Yorick", Ligeia, Mould, Sowerberry and Jerry Cruncher, the creaking door of the Inner Sanctum, or Waugh's current delightful satire on the Hollywood mortician. This is no ponderous history of mortuary law, recalling a time when a resurrection man stealing a body was guilty only of a misdemeanor, but if he left on more than an inch of the stocking was guilty of a felony and might be transported for seven years.

Here is the case of the embalmer liable for unfair depreciation of a rival whom he accused of intoxication when preparing General Grant's body for burial; of the funeral director who collected damages from a competitor who sent a card to a man whose wife was critically ill, reading "Bear in mind our Undertaking Department. Satisfaction guaranteed",

signing plaintiff's name. Here is also the Illinois statute which provides that "all persons shall be entitled to the full and equal enjoyment of . . . funeral hearses . . . and all other places of public accommodation".

More important for the practitioner, the author on the basis of many years' specialized experience and study in this field has produced a valuable handbook on all phases of mortuary jurisprudence. Citing and digesting a large number of cases, he treats of such subjects as licensing, rights in cemeteries, to bodies and to attend funerals, negligent driving of borrowed cars, autopsies, crimes, funeral bills and collection thereof and "Crowner's Quest" law. Here is a convenient means of finding helpful cases in this macabre but sometimes inescapable field of law, even litigation.

BEN W. PALMER
Minneapolis, Minnesota

FOR THOSE WHO WISH to pursue further readings as historical and legal background for Ben W. Palmer's current series of articles in the *Journal*, we recommend:

MOULDERS OF LEGAL THOUGHT. By Bernard L. Shientag. New York: The Viking Press (1943).

THE PARADOXES OF LEGAL SCIENCE. By Benjamin N. Cardozo. New York: Columbia University Press (1928).

SOCIAL CONTROL THROUGH LAW. By Roscoe Pound. New Haven: Yale University Press (1942).

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound. Boston: Marshall Jones Company (1925).

INTERPRETING THE CONSTITUTION. By William Draper Lewis. Charlottesville: Michie Casebook Company (1937).

LEGAL ESSAYS AND ADDRESSES. By the Right Honorable Lord Wright of Durley. London and New York: Cambridge University Press (1939).

READINGS IN JURISPRUDENCE. By Jerome Hall. Indianapolis: Bobbs Merrill Company (1938).

PLAYING FOR KEEPS. *By Roger Vailland. Boston: Houghton, Mifflin and Company. 1948. $3.00. Pages 271.*

Superficially, this novel, which was acclaimed when it was published in France, is an absorbing tale of members of the French underground "playing for keeps" in their perilous missions against the Nazis and the Gestapo. The author, who had been one of the most brilliant of French newspaper and magazine writers of the "surrealist" group, became a member of the French resistance network and carried out many secret missions at great hazard, all of which gives authenticity to his thrilling narration.

But implicit in the book is the dramatization of the struggle which besets and torments many modern and honest-minded men who find themselves carried into the heart of Marxism and then are confronted with the choice between intelligence and discipline, between freedom and subservience, between true liberalism of the spirit and the harsh, ruthless domination of the commissars. For those who like the subjective writings of the modern French school of symbolism and the gamut of passion, underneath a well-told tale of action and heroism on the surface, this novel contains excellent prose and evident sincerity.

REFLECTIONS OF A REVENUER. *By Aubrey R. Marrs. New York, Chicago and Washington: Commerce Clearing House. 1948. $2.00. Pages 160.*

The reflections of this "revenuer" relate to the twenty-five years he has spent collecting the federal income tax. Now the head of the Technical Staff of the Bureau of Internal Revenue, Mr. Marrs is evidently a serious, conscientious and painstaking "revenuer". In his book he discusses many of the legislative and judicial milestones that mark the highway along which the income tax law has come since the Sixteenth Amendment. The author's reflections on "Tax Avoidance Under the Law" are perhaps the most interesting. He assumes a broad and sweeping view of the income tax law, but one gathers the impression that he is a scrupulously fair "revenuer".

We Recommend . . .

Where a book raises your spirit, and inspires you with noble and courageous feelings, seek for no other rule to judge the event by; it is good, and made by a good workman. —Jean de la Bruyere

INDIVIDUALISM AND ECONOMIC ORDER. By Friederich A. Hayek, author of *The Road to Serfdom*. Chicago: University of Chicago Press; 1948; $5.00; Pages vii, 272. (This book of first importance by the author of the *Road to Serfdom* will be reviewed in our November issue.)

PERSUADE OR PERISH. By Wallace Carroll. Boston: Houghton Mifflin Company; 1948; $4.00; Pages 392. (Reviewed on page 938 of this issue.)

STALIN AND GERMAN COMMUNISM: A STUDY IN THE ORIGINS OF THE STATE PARTY. By Ruth Fischer. Cambridge: Harvard University Press; 1948; $8.00; Pages xxii, 687.

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Review of Recent Supreme Court Decisions

INSURANCE

National Service Life Insurance—Validity of Regulation 3450 of the Veterans Administration

■ *United States* v. *Zazove*, 92 L. ed. Adv. Ops. 1209; 68 Sup. Ct. Rep. 1284; 16 U. S. Law Week 4611. (No. 432, decided June 14, 1948.)

The beneficiary contested the validity of Regulation 3450 of the Veterans Administration on the ground that it was inconsistent with Section 602 (h) of the National Service Life Insurance Act, which provides that insurance shall be payable in the following manner:

> (1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.
>
> (2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary.

Regulation 3450 construed the benefits under subdivision (2) as limited to equal payments for 120 months, and any additional period during which the beneficiary might live, at such a rate that, taking into account the beneficiary's life expectancy, their present value would equal the face of the policy. The Circuit Court of Appeals for the Seventh Circuit construed it as affording equal payments for 120 months, and any additional period during which the beneficiary might live, the first 120 payments to have a present value totaling the face of the policy. The beneficiary was fifty-four years old and, under the Regulation, would have been entitled to payments of $29.50 a month, having a present value of $5000, the face of the policy, but, under the decision below, would have been entitled to payments of $48.08 a month, having a present value of $8145.

The Supreme Court reversed the Circuit Court of Appeals and upheld the Regulation in a unanimous opinion by the CHIEF JUSTICE. He held that the clauses of the statute which respectively made the insurance payable "in equal monthly installments for one hundred and twenty months certain" and "with such payments continuing during the remaining lifetime of such beneficiary" both provided components of the statutory equivalent of the face value of the insurance; that the specialized, technical, sense of the word "certain" required the construction placed upon it by the Regulation; and that the history of the legislation and subsequent treatment of the subject by Congress indicated a legislative intent in accordance with the Regulation. H.

The case was argued by Oscar H. Davis for the United States and Edward H. S. Martin for Zazove.

JUDGMENTS

Summary Judgment for Plaintiffs Vacated Without Passing on Merits in View of Incomplete Record in Test Case

■ *Kennedy* v. *Silas Mason Company*, 92 L. ed. Adv. Ops. 989; 68 Sup. Ct. Rep. 1031; 16 U. S. Law Week 4449. (No. 590, decided May 17, 1948.)

In this case there was presented, on a motion for summary judgment, the question whether the overtime provisions of the Fair Labor Standards Act applied to certain persons employed in a government-owned plant in which the Mason Company produced munitions under a cost-plus-fixed-fee contract with the War Department. Various subsidiary questions were presented. Summary judgment was granted against the defendants and the Fifth Circuit Court of Appeals affirmed.

On certiorari the Supreme Court vacated the judgment. Mr. Justice JACKSON delivered the opinion of the Court. Without passing on the merits, the Court concluded that proper judicial administration required withholding of a decision on the ultimate questions presented until a more complete record be formulated. It was pointed out that the Department of Justice supported the plaintiff's contention while the Department of the Army opposed it, and that the ultimate cost will fall on the Government if the overtime regulations apply. In these circumstances, and in view of new contentions raised on appeal, the Court concluded that the complications and importance of the case required a more complete record before the issues could be authoritatively determined.

Mr. Justice BLACK was for reversal; Mr. Justice DOUGLAS concurred in the result. H.

The case was argued by Leonard Lloyd Lockard for Kennedy and William L. Marbury and Charles D. Egan for the Mason Company.

LABOR LAW

Fair Labor Standards Act—Determination of Regular Rate of Pay

■ *Bay Ridge Operating Company* v. *Aaron, Huron Stevedoring Corporation* v. *Blue*, 92 L. ed. Adv. Ops. 1146; 68 Sup. Ct. Rep. 1186; 16 U. S. Law Week 4500. (Nos. 366-367, decided June 7, 1948.)

These cases involved the interpretation of Section 7 (a) (3) of the Fair Labor Standards Act in relation to wages paid to longshoremen working under a collective bargaining agreement. The Act requires that no employer shall employ any employee (subject to the Act) for a work-week longer than forty hours, unless the employee receives compensation for hours in excess of forty at the rate of one and one-half times the "regular rate" at which he is employed.

The longshoremen's collective bargaining contract provided straight time hourly rates for work done within a prescribed 44-hour time

Reviews in this issue by James L. Homire and Mark H. Johnson.

schedule and contract overtime rates for all work done outside the straight time hours. The straight time hourly rates varied depending on the type of cargo. The overtime rates applied to all work on Sundays and holidays. No differential was provided for work in excess of forty hours in a week or for work in excess of forty-four hours a week except as necessarily resulting from work outside the 44-hour time schedule. The contract straight time rates applied to the more desirable hours of the day for working, and the contract overtime applied to hours other than those scheduled for contract straight time, as well as to work on Sundays and holidays. The occupation involves irregular hours and shifting from one employer to another.

The Court concluded, upon an analysis of the intricate and complicated factual situation involved, that, unless the amount paid contains something representing an overtime premium, the rule for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any work-week and adjudge additional payment to each individual on that basis for time in excess of forty hours worked for a single employer. The Court also concluded that all overtime premiums must be deducted from the actual wages paid for the purpose of computing the regular rate, but that a higher rate of pay allowed as a job differential or as a shift differential, or for Sunday or holiday work, was not an overtime premium. Mr. Justice REED delivered the majority opinion.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which Mr. Justice JACKSON and Mr. Justice BURTON concurred. This opinion stressed the importance of the collective bargaining agreement in determining the meaning of "regular rate" and argued that that term means "straight time" scale provided for in the union contract. H.

The cases were argued by Peyton Ford and Marvin C. Taylor for Bay Ridge and Huron and by Monroe Goldwater for Aaron and Blue.

MONOPOLIES

Sherman Anti-Trust Act—Acquisition of Steel Plant by Large Producer of Steel Sustained as Lawful Process of Vertical Integration

■ *United States* v. *Columbia Steel Company*, 92 L. ed. Adv. Ops. 1173; 68 Sup. Ct. Rep. 1107; 16 U. S. Law Week 4515. (No. 461, decided June 7, 1948.)

This appeal was taken to review a decision of the United States District Court in Delaware, which refused to enjoin the purchase by United States Steel Corporation and its subsidiaries of the assets of Consolidated Steel Corporation. The government contended that the acquisition would violate articles 1 and 2 of the Sherman Act. It was alleged that competition in the sale of rolled steel products and in fabricated steel products would be restrained, and that the contract indicated an effort by United States Steel to monopolize the market in fabricated steel products.

The trial court entered judgment for the defendants. On appeal, the Supreme Court affirmed, by a divided bench. Mr. Justice REED delivered the prevailing opinion. The government charged that the acquisition of Consolidated would constitute an illegal restraint because all manufacturers except United States Steel would be excluded from supplying Consolidated's requirements of rolled steel products, and competition between those two companies in selling structural fabricated products and pipe would be eliminated. The government also argued that the present acquisition, in the light of history, constituted an attempt by United States Steel to monopolize the production and sale of fabricated steel products in Consolidated's market.

On review of the record, these contentions were rejected. Particular stress is placed on the view that vertical integration, as such and without more, does not violate the Sherman Act. The Court says: "No direction has appeared of a public policy that forbids, *per se*, an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nationwide or countrywide."

The contention that the acquisition, viewed in the light of United States Steel's history, constitutes an attempt to monopolize is found to be unsubstantiated. "The acquisition . . . seems to reflect a normal business purpose rather than a scheme to circumvent the law."

Mr. Justice DOUGLAS delivered a dissenting opinion in which Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice RUTLEDGE concurred. This opinion asserts: "This is the most important anti-trust case which has been before the Court in years." It is emphasized that this "is a purchase for control, a purchase for control of a market for which United States Steel has in the past had to compete but which it no longer wants left to the uncertainties that competition in the West may engender". And it is emphasized that the intent or purpose is immaterial if monopoly or restraint of trade results as a direct and necessary consequence of what is done.

H.

The case was argued by Philip B. Perlman for the United States, Nathan L. Miller for Columbia and Alfred Wright for Consolidated.

Sherman Anti-Trust Act — Contracts Between Beet Growers and Sugar Refiners Fixing Uniform Price of Sugar Beets

■ *Mandeville Island Farms* v. *American Crystal Sugar Company*, 92 L. ed. Adv. Ops. 962; 68 Sup. Ct. Rep. 996; 16 U. S. Law Week 4437. (No. 75, decided May 10, 1948.)

This was an action for treble damages for alleged violation of the Sherman Act. The petitioners were sugar beet growers who produced and sold beets to the respondent American Crystal Sugar Company, a sugar refiner, in northern California. The growers alleged that the only practical outlet for their beets was to three refiners in the area, of which Crystal was one, and the three had entered into a contract to pay a uniform price for beets. The price

was made to depend on the net returns per hundred pounds realized by the refiners on sugar and on the sugar content of the individual grower's beets. The three refiners adopted identical form contracts. It was alleged that sugar made from beets grown in the area was sold in interstate commerce, and that Crystal had conspired with other refiners to monopolize and restrain interstate trade and commerce and to unlawfully fix the prices paid to the growers, all in violation of the antitrust laws, and that the refiners no longer competed with each other as to the price they paid the growers for beets.

The trial court granted a motion to dismiss the amended complaint, and the Ninth Circuit Court of Appeals affirmed. On certiorari, the Supreme Court reversed. Mr. Justice RUTLEDGE delivered the opinion.

The opinion discusses at length the contentions of the parties. The growers contended that the process of growing beets was integrated with the process of refining them into sugar and distributing it, that the complete process was an entirety and within the Sherman Act. The refiners contended that growing and selling beets was a wholly local activity, beyond the operation of that Act. While *U.S.* v. *Knight Co.*, 156 U.S. 1, supports the contention of the refiners, it was pointed out that a line of more recent decisions takes a more realistic view of the economic process as a whole, and makes the labels "production" and "manufacturing" no longer controlling as to the scope of the Act.

Turning then to the specific allegations of the complaint, it was concluded that it sets up a conspiracy to fix prices, that this restrains commerce and the restraints affect the flow of sugar in interstate commerce. The allegations were held sufficient to state a cause of action.

Mr. Justice JACKSON delivered a dissenting opinion in which Mr. Justice FRANKFURTER joined. This opinion stressed what was thought to be a misunderstanding of an amendment made at the suggestion of the trial court. This related to whether the growing contracts affected the price of sugar in interstate commerce, since the trial court thought that no cause of action was stated without an allegation that the contract had that effect. The complaint was amended, as construed by the minority, to eliminate the charge that the contracts affected the price of sugar in interstate commerce. On this basis, the dissenting justices were of the opinion that the judgment should be affirmed, saying that the majority had assumed that the price of sugar had been affected and, on that basis, had built its thesis that the Sherman Act had been violated. H.

The case was argued by Stanley M. Arndt for Mandeville and Pierce Works for American.

Venue — Sherman Anti-Trust Act — Doctrine of *Forum Non Conveniens* Not Applicable

■ *United States* v. *National City Lines*, 92 L. ed. Adv. Ops. 1115; 68 Sup. Ct. Rep. 1169; 16 U. S. Law Week 4483. (No. 544, decided June 7, 1948.)

Suit was brought for injunctive relief against the defendants, charging them with violations of Sections 1 and 2 of the Sherman Act. The suit was brought in the District Court for Southern California. On motion, the trial court dismissed the suit on the ground that it was not a convenient forum, but without prejudice to the institution of a similar suit in a more appropriate and convenient forum.

On appeal the Supreme Court reversed. Mr. Justice RUTLEDGE delivered the opinion of the Court. Venue of suits is governed by Section 12 of the Clayton Act, which provides:

> Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. 38 Stat. 736, 15 U.S.C. § 22.

The Court concluded that the choice of venues given to the plaintiff is not to be qualified by any power of a court having venue under any of the section's alternatives to decline to exercise the jurisdiction conferred.

Mr. Justice JACKSON delivered a concurring* opinion. Mr. Justice FRANKFURTER delivered a dissenting opinion in which Mr. Justice BURTON joined. H.

The case was argued by Charles H. Weston for the United States and C. Frank Reavis for National City Lines.

TAXATION

Interstate Commerce — Transportation Between Points in Same State, Over Highway in Other State

■ *Central Greyhound Lines* v. *Mealey*, 92 L. ed. Adv. Ops. 1235; 68 Sup. Ct. Rep. 1260; 16 U. S. Law Week 4606. (No. 14, decided June 14, 1948.)

The taxpayer was engaged in bus transportation between points in the State of New York, but over routes utilizing the highways of Pennsylvania and New Jersey for a substantial distance. New York imposed a tax on the entire gross receipts from such transportation, and was sustained by the state courts against attack under the commerce clause. The judgment was reversed and remanded in an opinion by Mr. Justice FRANKFURTER, condemning the tax on the entire gross receipts, but stating that the tax might constitutionally be apportioned on a mileage basis, although the question whether the statute permitted apportionment was for the New York courts.

The opinion analyzes the line of cases beginning with *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192, which sustained a tax on gross receipts from transportation from Pennsylvania to a point immediately beyond the border of New Jersey. The present opinion indicates that the result there may be sustained on the theory of *de minimus*, and criticizes subsequent interpretations of that decision as employing a "needless fiction", viz., that interstate commerce becomes local commerce when it is properly subject to local regula-

tion or taxation. Commerce is interstate if there is a physical crossing of state lines, and a tax imposed by one state may not be measured by receipts for the distance traveled in another state. Emphasis is placed upon the double taxation which may result from the proper imposition of tax by Pennsylvania and New Jersey based upon the use of their own respective highways.

Mr. Justice RUTLEDGE concurred in the result without opinion.

Mr. Justice MURPHY delivered a dissenting opinion in favor of affirmance, in which Mr. Justice BLACK and Mr. Justice DOUGLAS concurred. The dissent contends that the transactions here were "commercially" intrastate, even though "physically" interstate, and that the former characteristic should be controlling where the tax is imposed upon the receipts from the transportation. J.

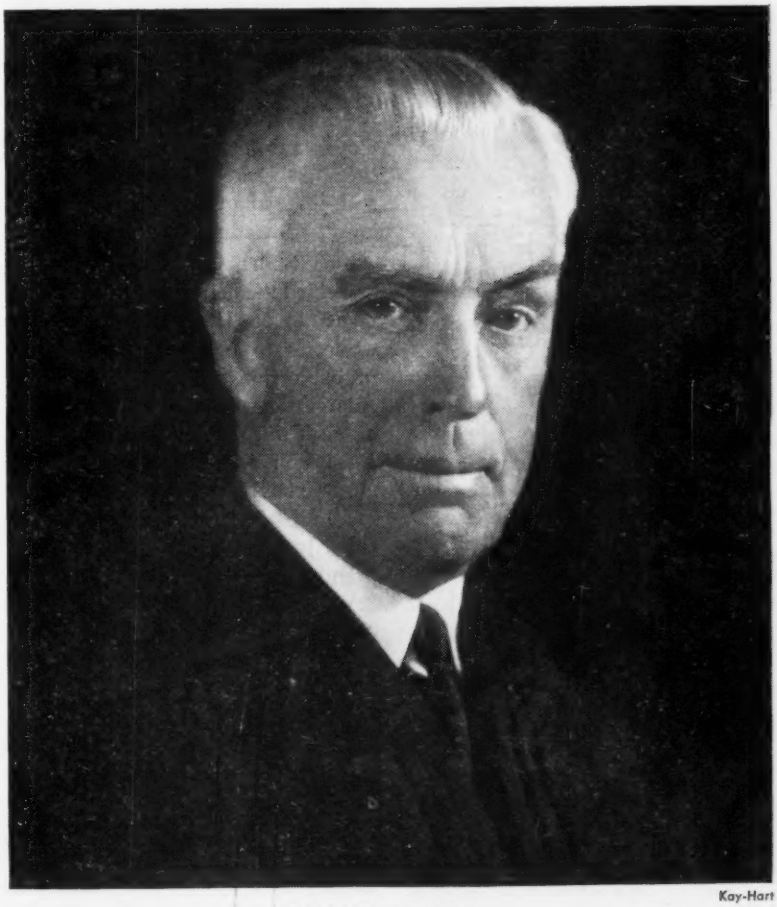
The case was argued by Tracy H. Ferguson for Central Greyhound and John C. Crary, Jr., for Mealey.

Judge William Denman Becomes Chief Judge of the United States Court of Appeals for the Ninth Circuit

▪ Francis A. Garrecht, presiding judge of the United States Circuit Court of Appeals for the Ninth Circuit, died on August 11 at the age of 77, and Judge William Denman, of San Francisco, as next in commission, became the chief judge for the Ninth Circuit. This adds another to the many changes which have taken place in the office of chief judge in the circuits since the JOURNAL published its series of sketches of the incumbents, which began in November of 1946. New chief judges have taken office in the Fifth, Seventh, Eighth and Ninth Circuits and the District of Columbia.

Judge Denman was born in San Francisco and was graduated from the University of California and the Harvard Law School. Admitted to the California Bar in 1898, he practiced law actively and successfully for many years until his appointment as United States Circuit Judge in 1935. He was an outstanding practitioner in the law of admiralty. He became a member of our Association in 1912, has at times been active in the San Francisco Bar and the California State Bar, and took a considerable part in the development and enactment of the "California Plan" for the non-political selection of judges of State Courts, based on the American Bar Association's recommendations. A further sketch of the new senior circuit judge of the Ninth will be prepared and published.

The death of Judge Garrecht removes a beloved and colorful jurist who was a "liberal" in his political affiliations but an adherent of justice according to law in his judicial decisions. Our portrait and sketch of him were in 33 A.B.A.J. 239; March, 1947.



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WILLIAM DENMAN

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Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Administrative Law . . . Administrative Procedure Act held inapplicable to deportation proceedings.

■ *Wong Yang Sung* v. *Clark*, U.S.-D.C., D. C., July 28, 1948, Holtzoff, A.J.

This action arose on a writ of habeas corpus to review an order of deportation. Petitioner maintained that the proceeding which led to the order was not conducted in accordance with the Administrative Procedure Act, in that the hearing was conducted by an Immigration Inspector or Board of Inspectors rather than before an examiner appointed pursuant to the provisions of the Act.

The Court, in an oral opinion dismissing the writ, held the Act inapplicable to deportation proceedings. Section 7 (a) of the Act exempts "the conduct of specific classes of proceedings . . . before boards or other officers specially provided for by, or designated pursuant to statute". Section 152, Title 8, of the Immigration Law empowers Immigration Inspectors to administer oaths, and to take, consider, and record evidence touching on the right of any alien to enter, re-enter, pass through or reside in the United States. This was deemed to satisfy the exemption contained in §7 (a). [For *contra* ruling by Goldsborough, A.J., in *Eisler* v. *Clark*, see 34 A.B.A.J. 603; July, 1948.]

Administrative Law . . . judicial review . . . Veterans Administration's insurance orders reviewable . . . declaratory judgment action available.

■ *Unger* v. *U. S.*, U.S.D.C., E.D., Ill., July 12, 1948, Lindley, J. (Digested in 16 U. S. Law Week 2054, August 3, 1948.)

The Veterans Administration granted a pension to complainant for a service-connected disability, but subsequently denied an application for life insurance on the grounds that, for insurance purposes, his disability was not service-connected. Complainant, asserting such denial to be arbitrary and unlawful, brought suit for a declaratory judgment that he was entitled to insurance. Defendant, in support of a motion to dismiss, argued that the Administrator's decision was not subject to judicial review, that the United States had not consented to be sued in a declaratory judgment action, and that complainant had not exhausted his administrative remedies.

The Court, denying the motion, expressed the belief that 1946 amendments to 38 USC §§808 and 817, while far from explicit, indicated a probable Congressional intention to enlarge the sphere of judicial review of such insurance decisions. This conclusion was reinforced by language from the Supreme Court opinion in *United States* v. *Zazove*, decided June 14, 1948. The Court also found support in an analysis of §10 (c) of the Administrative Procedure Act which provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." The Court's view was: "Prior to the Act, administrative orders such as the one with which we are concerned were not reviewable unless the statute so provided. Such orders are now reviewable unless the statute reflects an intent that they are not reviewable."

Determination that VA insurance orders were reviewable was deemed to require the conclusion that a declaratory judgment action was available to complainant, the Congressional authorization of judicial review being construed as the consent necessary to use of declaratory judgment proceedings against the government.

The argument that complainant had not exhausted his administrative remedies was disposed of on the grounds that the letter notifying complainant of the rejection of his application did not inform him of any administrative appeal, and that no further administrative remedy had been shown.

Attorney and Client . . . consultant in industrial relations and personnel management is not engaged in the unauthorized practice of law.

■ *Auerbacher* v. *Wood*, N.J. Ct. Err. App., July 2, 1948, Heher, J. (Digested in 16 U. S. Law Week 2055, August 3, 1948.)

Complaint was made that defendant layman, who advertised his "availability" to employers for "guidance . . . in the use of industrial relations and collective bargaining techniques", and his willingness to "collaborate with members of the legal profession" and to accept "forwarded matters on a referral basis", intended to engage in the unauthorized practice of law. The Court dismissed the bill of complaint, finding that defendant merely intended to practice the profession of a consultant in industrial relations and personnel management.

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Inasmuch as the field of industrial relations has become a specialty, the incidental use of legal knowledge by such a specialist in seeking "the adjustment of essentially non-legal issues and controversies" does not, according to the Court, constitute the practice of law. Such a situation was distinguished, however, from that where things are done which are not merely incidental to this service in the field of industrial relations, but rather "constitute the practice of law as an adjunct to such service", thus subjecting the unlicensed practitioner to legal sanctions. Citing *Application of New York County Lawyers Association (In re Bercu)*, 273 App. Div. 524, reviewed in 33 A.B.A.J. 496, May, 1947; 34 A.B.A.J. 508, 519, June, 1948, the Court stated that "in confining the practice of the law and non-legal endeavors within their respective areas, guidance is to be found in the consideration that the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law".

Commerce . . . what constitutes . . . organized professional baseball teams are not engaged in "trade" or "commerce" within the meaning of the Sherman Act.

■ *Gardella* v. *Chandler* et al, U.S.-D.C., S.D.N.Y., July 13, 1948, Goddard, D.J.

Plaintiff, a professional baseball player employed by the New York Giants in 1944 and 1945, was in 1946 suspended by defendant Chandler, Commissioner of Baseball, from organized baseball for five years for having broken the "reserve clause" of his contract with the Giants and played baseball for an "outlaw" employer in Mexico. The instant action, brought against Chandler and other officials of organized baseball, charged that the suspension deprived plaintiff of opportunity to earn his livelihood by playing baseball and constituted a conspiracy in restraint of trade in violation of the Sherman Act; treble damages were sought. A motion to dismiss for failure to state a cause of action was granted.

The Court deemed the case to be governed by *Federal Baseball Club* v. *National League* (1922), 259 U.S. 200, which held that major league ball clubs were not engaged in interstate "trade" or "commerce" within the meaning of the Sherman Act. The Court took note of the detailed description of the activities and operations of organized baseball, as set forth in the complaint in order to establish that interstate commerce was involved, but held that the operating methods of baseball have changed since the *Federal* case only by adjustment to radio and television, which was apparently deemed a factor insufficient to distinguish the former case on the factual level. Nor could the Court agree that the *Federal* case was no longer good law, despite the widening scope of interstate "commerce" as reflected in more recent decisions, and the virtual overruling of cases relied on in the *Federal* opinion. The continued vitality of the *Federal* case was said to be exemplified by the reliance placed on it by the Second Circuit as recently as the opinion in *Conley* v. *San Carlo Opera Co.* (1947), 163 F. (2d) 310, 311.

Constitutional Law . . . delegation of legislative power . . . statute permitting Commissioner of Education to prescribe regulations under which non-public schools may be licensed invalid delegation of legislative power.

■ *Packer Collegiate Institute* v. *University of the State of New York*, N. Y. Ct. App., July 16, 1948, Desmond, J.

A private educational institution for girls refused to comply with and challenged the constitutionality of the New York Education Law, §3210, subd. 2e, and the regulations adopted in pursuance to it, the latter prescribing standards as condition to the registration of private nonsectarian schools. The Education Law in §3210, (5) e, provides that all nursery, kindergarten and elementary schools other than those maintained by the public school authorities or an established religious group must be registered biennially under regulations of the Commissioner of Education, as prescribed by the Board of Regents. Such regulations, adopted in 1939 and amended periodically, set forth various minimal requirements for registration. The Court, by a four-to-two vote, with one judge taking no part, held the delegation invalid.

Writing for reversal of the court below, Desmond, J., with whom two other judges concurred, held the statute patently invalid as a delegation of legislative power in contravention of article 3, §1 of the New York State Constitution. He found that the legislature had neither specified, even in general terms, the purpose or subject matter of the regulations, nor set out standards or tests by which the qualifications of the schools might be measured. In the absence of a clearly delimited field of action and legislative guidance as to the exercise of administrative discretion, the Commissioner was said to be left unchecked "to do what he will with these schools; and the statute's validity must be judged not by what has been done under it but 'by what is possible under it' ". Declaring this to be "no small or technical matter" in view of the limited right of the legislature to regulate private schools in the public interest, Judge Desmond considered it "intolerable for the legislature to hand over to any official or group of officials [such] an unlimited, unrestrained, undefined power . . ."

Concurring in Judge Desmond's conclusion, Fuld, J., was of the opinion that the statute also violated the equal protection clause of both federal and state constitutions.

Lewis, J., with whom one judge concurred, dissenting, maintained that there was no unlawful delegation of legislative power under the statute since a reasonable amount of discretion may be validly delegated to administrative officials where it would be difficult and impractical for the legislature to act in detail.

The statute was said to contain standards adequate in dealing with the particular educational problem involved, and the regulations adopted by the Commissioner were deemed reasonable in carrying out the intent of the legislature.

Elections . . . nominating petitions . . . Ohio Wallace-for-President Committee entitled to a place on Ohio ballot, although three of eleven signing affidavit denying advocacy of government's overthrow by force or violence were Communists . . . presidential nominees barred from ballot because not chosen at a national convention preceded by Ohio primary as required by Ohio law . . . electors given places as nominees for state offices.

■ *Beck, Ohio, ex rel.* v. *Hummel,* Ohio Supreme Ct., July 22, 1948, Stewart J.

The Ohio Wallace-for-President Committee was denied a place on the Ohio general election ballot by the Ohio Secretary of State. From this denial an appeal was taken to the Supreme Court. A mandamus proceeding was also instituted in the Supreme Court to compel the listing on the ballot of the Wallace-Taylor presidential ticket, nominated, together with twenty-five presidential electors, by petition as independent candidates. The Secretary maintained that the Wallace group fell under the Ohio statutory ban against inclusion on the ballot of any group which advocates the overthrow, by force or violence, of the government, or which engages in treasonable activities. He further maintained that the Wallace-Taylor slate was ineligible for the ballot because the nominations did not comply with Ohio statutory requirements.

The Court held that the Committee's affidavit denying advocacy of violent revolution or treason complied with the statutory requirement and that the Secretary acted without sufficient evidence when he certified that the Wallace group was not entitled to a place on the ballot because three of the eleven signers of the affidavit were Communist party members. The Court observed that the Wallace group in Ohio consisted of at least 46,000 persons, signers of the nominating petitions, and that the statute was directed against a *"group"* which advocated forceful overthrow of the government. The opinion stated ". . . . it is a matter of common knowledge that there are Communists who do not wish to overthrow our government by force but who desire to accomplish the ends they have in view by constitutional methods". Accordingly, the Secretary's ruling on this point was reversed.

A more intricate problem was presented by the statutory requirements. The Ohio statutes provide for printing on the ballots only the names of presidential candidates nominated by a national convention to which delegates were selected at the Ohio presidential primaries. In such a case the names of the presidential electors do not appear on the ballot. Since the Wallace-Taylor ticket was not chosen at a convention preceded by a primary election, the names of Wallace and Taylor could not be placed on the general election ballot.

The majority of the Court, however, espoused the principle that "all election statutes should be liberally interpreted in favor of the right to vote according to one's belief or free choice", and held that presidential electors were state officers, who could be nominated by petition as independent candidates. Accordingly, the Secretary was ordered to place on the ballot the names of the twenty-five electors nominated by the Wallace group.

Matthias, J., and Turner, J., dissented from this position on the principal grounds that the United States Constitution places control of the selection or appointment of presidential electors in the state legislatures, and that the Wallace group had not complied with the requirements established by the Ohio legislature governing the choice of presidential electors.

Labor Law . . . union demand that employers acquiesce in discrimination against non-union seamen in operation of hiring-halls constitutes violation of §8(b)(2) of Labor-Management Relations Act . . . union's insistence on such acquiescence as condition precedent to collective bargaining constitutes refusal to bargain in violation of §8(b)(3) of Act.

■ *In re National Maritime Union of America,* Case Nos. 13CB-19-22, NLRB, August 17, 1948.

Respondent union struck against certain shipowners after negotiations for a new employment contract broke down because of the shipowners' refusal to continue the previous contract requirement that the owners hire seamen only through NMU-operated hiring-halls. The halls gave preference to NMU members by placing non-union seamen only when union men were unavailable, and by giving such placed non-union men short-term "trip cards" subjecting them to replacement by NMU members. The Board, in the instant opinion, sustained with modifications the intermediate report of an NLRB trial examiner holding the NMU's activities violative of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947.

The Board agreed with the examiner that the hiring-halls discriminated against non-union seamen. Accordingly, the NMU's insistence on renewal of the hiring-halls provisions constituted an unfair labor practice under §8 (b) (2) of the Act, so characterizing an attempt to cause an employer to discriminate against an employee in violation of §8 (a) (3). The last mentioned section characterizes as an unfair labor practice for an employer by discrimination regarding employment to encourage or discourage membership in any labor organization. The Board, which construed the inhibitions of §8 (a) (3) as applying to applicants for employment as well as to employees, and to an attempt to discriminate as well as to an accomplished discrimination, did not accept the claim that the pertinent sections did not come into effect until an employee had actually lost his job,

and so applied only to the performance, and not to the mere signing, of a contract containing discriminatory features. Argument that the economic conditions in the shipping industry necessitated hiring-halls was deemed to raise issues appropriate for Congress rather than the Board.

The Board also agreed with the conclusion of the trial examiner that the NMU had violated §8 (b) (3) of the Act by refusing to bargain collectively in good faith with the shipowners. The Board, however, rejected the examiner's reasoning that the NMU's "adamant position with respect to the hiring hall evinced a mind closed to persuasion and without sincere purpose to find a basis for agreement, an attitude . . . incompatible with good faith bargaining". The Board pointed out that the shipowners were no less adamant in refusing to continue the hiring-halls, which they regarded as illegal, and expressed the view that intransigence on an issue is evidence of bad faith only where the record indicates an unwillingness to reach *"any"* agreement. The Board rested its conclusion on the principle that the Act does not permit insistence that the other party agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. "By their insistence upon the continuation of a practice which the Act now forbids," the Board said, "as a condition precedent to entering into any agreement, the [NMU] . . . refused to bargain in violation of Section 8 (b) (3) of the Act."

The Board overruled the examiner's position that the NMU had attempted to restrain or coerce employees in violation of §8 (b) (1) (A). The legislative history of the Section was deemed to show that Congress did not intend to prohibit strikes which would have, as one effect, the dimunition of employment opportunities for non-union men, but only to prohibit coercive measures against individuals to compel acceptance of union membership. The Board said: "This strike, though violative of Section 8(b) (2), had as its *prime* objective the protection of the employment interests of NMU members, and not the coercing of non-members to join the union." Member Gray dissented from this portion of the opinion on the ground that, viewed realistically, the hiring-hall system coerced non-union seamen by depriving them of employment. The majority, in reply, pointed out that "Mr. Gray's reasoning, carried to its logical conclusion, would require outlawing practically any strike opposed by some employees".

The Board held the remedy for these violations to be an order prohibiting the NMU from requiring hiring-hall provisions in employment contracts and from instigating or approving a strike for that purpose, and ordering the NMU to bargain collectively on other issues. The Board held itself without power to assess monetary damages against the NMU to reimburse the shipowners for loss due to the illegal strike; this was deemed a function of the courts rather than the Board.

Monopoly . . . copyrights . . . ASCAP enjoined from violation of anti-trust laws involved in requiring motion picture exhibitors to obtain separate blanket licenses for the public performance of films with synchronized musical compositions, in addition to licenses obtained by producers for the synchronization of copyrighted music.

■ *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, U.S.D.C., S.D.N.Y., July 19, 1948, Leibell, D.J.

Plaintiff motion picture theater operators brought this action for treble damages for, and injunctive relief against, continuance of violation of the anti-trust laws alleged to be involved in requiring plaintiffs to obtain an annual blanket license for the public performance for profit of copyrighted musical compositions incorporated into the sound track of motion pictures exhibited by plaintiffs.

The Court found that defendant ASCAP was accustomed to obtain from its members, publishers and composers, assignments of the power to license the public performance of their copyrighted compositions. Blanket licenses were issued to radio stations, bands, motion picture exhibitors, etc., and the fees collected divided among ASCAP members. Members of ASCAP individually licensed motion picture producers to record their compositions on the motion picture sound tracks. The license to the producer, however, did not include the right to perform the composition publicly for profit; each exhibitor had to secure that right before exhibiting the film and integrated sound track. ASCAP controlled the licensing for such performance of 80 per cent of the tunes used in motion pictures, and issued blanket licenses to theater operators, for which an annual fee was charged, based on the seating capacity of the theater. These fees were divided among ASCAP's members. The major producers had large interests in music publishing houses, and consequently received a substantial portion of the license fees divided among ASCAP members. Producers commonly prohibited the exhibition of their films in theaters not licensed by ASCAP. When a producer used a composition not controlled by ASCAP, he purchased both the recording and the performing rights, and so made it unnecessary for exhibitors to procure licenses to perform such numbers.

On these facts, the Court held that ASCAP was a conspiracy in restraint of trade in violation of the anti-trust laws. According to the Court, ". . . the cases which have held that patent owners may not combine their patents so as to extend the monopoly of the one patent by the monopoly of the other, state the legal principles which prevent two copyright owners from doing a similar thing". This principle was deemed to apply with particular force in view of the restriction imposed by producers on exhibition of films in non-ASCAP licensed theaters, thus combining the motion picture copyright monopoly with the musical composition copyright monopoly.

In view of the impracticability of an exhibitor's securing a license for each piece of music incorporated in a motion picture sound track, however, and in view of the reasonableness of the scale of ASCAP licensing fees, the Court held that plaintiffs had failed to demonstrate injury entitling them to damages. The Court, however, granted injunctive relief requiring ASCAP to relinquish control over the public performance licensing of music used in motion pictures, prohibiting its members from separating the right of public performance from the right to synchronize with motion pictures, and prohibiting them from licensing exhibitors to perform such synchronized music.

Radio Communication . . . political broadcasts . . . three-judge statutory court lacks jurisdiction to annul FCC's obiter interpretation of political broadcast section of Communications Act since Commission's opinion is not a reviewable "order" under §402(a) of Act.

■ *Houston Post Co.* v. *U. S.*, U. S. D.C., S. Tex., August 3, 1948, Hutcheson, C.J.

Plaintiff owner of a Texas radio station sued under §402 (a) of the 1934 Communications Act to annul and enjoin the enforcement of the Federal Communications Commission's interpretation of §315 of the Act. This section provides that if any licensee permits a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates, that the licensee shall have no power of censorship over the material broadcast, and that no obligation is thereby imposed upon any licensee to allow the use of its station by any such candidates. The FCC, while deciding *In re Port Huron Broadcasting Company* on June 28, 1948, stated obiter that this prohibition against any political censorship is absolute and prohibits censorship of material even if it is libelous or might tend to involve the station in an action for damages. Plaintiff contended that the Commission's action would compel plaintiff to choose between the dangers of losing its license for noncompliance with the opinion, or of being sued for libel upon compliance.

Dismissing the suit for lack of jurisdiction, the Court held that the FCC opinion was not a reviewable "order" or regulation under §402(a) of the Communications Act, but merely an interpretation without the force of law as to the obligation imposed by §315 itself. According to the Court, the views expressed by the Commission "neither direct anyone to do anything, nor finally adjudicate a fact to exist upon which some right or duty immediately depends", and thus do not constitute, nor were they an oblique attempt to constitute, a regulation with sanctions promulgating a rule of conduct. The Court distinguished *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, which involved the question whether the action for relief against the Commission's orders was premature, as a case where the regulations complained of were admittedly promulgated by "order" and hence were reviewable. Plaintiff's position was deemed "quite unfounded" in view of the fact "that the Supreme Court has not construed the section; that there is no body of judicial opinion interpreting it as the Commission has done, but such opinion as there is *is* directly to the contrary, and that prohibitions against censorship have been uniformly held not to prevent the control of language which is beyond the scope of guarantees of free speech".

United States . . . Federal Tort Claims Act . . . subrogees may prosecute claims in own right . . . foreign insurance companies may be subrogated to claims under Act.

■ *South Carolina State Highway Dept. et al.* v. *U. S.*, U.S.D.C., E.D. S.C., June 15, 1948, Waring, D.J. (Digested in 16 U. S. Law Week 2022, July 13, 1948.)

A merchant vessel owned by the United States collided with a toll bridge owned by plaintiff Highway Department, which sued under the Federal Tort Claims Act, 28 USC §931 *et seq.*, to recover for injury to the bridge and for loss of revenue during the repair period, alleging that the collision was caused by the negligence of defendant's employees, the ship's officers. Joined as plaintiffs were various insurance companies as subrogees to the extent of payments made to the highway department under policies on the bridge. A motion to dismiss the insurance companies as improperly joined was denied.

The government's principal contention was that subrogees are excluded from recovery under the Act and that only parties actually suffering loss are entitled to take advantage of it. Underlying this contention was the principle of strict construction of statutes waiving sovereign immunity. The Court, however, deemed that the grant of jurisdiction over "any claim" for money damages "on account" of injury to or loss of property attributable to the negligence of federal employees (28 USC §931) was sufficiently broad to include claims by subrogation, even though subrogees were not specified as claimants. Moreover, the Court maintained, the judiciary, like the legislature, is recognizing the justice of relaxing sovereign immunity, and a more liberal construction of sovereign immunity waivers is the trend of modern cases. Accordingly, the insurance companies were properly joined as plaintiffs since "the language of the Act . . . in no way forbids subrogation and . . . the Act was intended to allow *any* parties having valid claims against the government . . . to bring their suit . . ."

An additional motion urged the dismissal of two foreign insurance companies. The Court, however, denied that the Act "puts any penalty upon a foreign insurance company doing business in this country", or even requires the extension by the respective foreign governments of reciprocal rights to American entities. Accordingly, this motion also was overruled.

Practising lawyer's guide to the current LAW MAGAZINES

AGENCY—*"Agency Powers":* In the field of legal periodicals, Professor Warren A. Seavey, of the Harvard Law School, lends his distinguished name to the debut of a welcome new quarterly, the *Oklahoma Law Review* (Vol. 1—No. 1; pages 3-20), with an article dealing with the more unusual cases of liability of a principal for the acts of his agent. He cites a number of situations in which Courts have held the principal liable for transactions entered into by an agent, even though the agent has lacked the generally required "apparent authority" and under circumstances in which the elements of estoppel were not present. The JOURNAL greets warmly the newcomer to the roster of useful law reviews which are accomplishing much for their law schools, their students, their faculties, their alumni, and through this department the practicing profession, which turns increasingly to the law reviews for practical material on the subjects expounded in articles noted here. Beyond a doubt the actively practicing lawyers who read the reviews for us and select the articles to be commented on, and prepare these notes, pass over and neglect many erudite contributions which are a credit to the scholarship of the profession; but the pragmatic test applied by this diligent group which has given so generously of its uncompensated time for the benefit of the profession seems to be chiefly a potential usefulness to practicing lawyers in our diversified profession. The law reviews in small schools and large which obtain and publish articles and "notes" of this character find such products selected for inclusion here. (Address: Oklahoma Law Review, Norman, Okla.; subscription price: $5.00 per year.)

CONFLICT OF LAWS—*"The Full Faith and Credit Clause and Fraternal Insurance":* The March-April issue of the *Illinois Law Review* (Vol. 43—No. 1; pages 116-121) contains a useful "note" on the recent decision in *Order of United Commercial Travelers of America* v. *Wolfe,* 331 U. S. 586, 67 S. Ct. 1335 (1947). In that case the Supreme Court reversed the South Dakota Court and held that a claimant suing in South Dakota, the domicile of the decedent, to recover benefits arising under the constitution of a fraternal benefit society incorporated in Ohio was bound under the "full faith and credit clause" by the statute of limitations contained in the Ohio charter of the society. The author sets forth the doctrine underlying the treatment previously accorded fraternal insurance contracts by the Supreme Court, which has required that the interpretation and effect given to the charters of these societies in the State of their incorporation be given full faith and credit in whatever foreign jurisdiction litigation concerning such contracts might arise. While the ruling in the *United Commercial Travelers* may be consistent with the earlier decisions concerning such contracts, the author cautions against extending this assumption too far, on the ground that compelling another forum to apply the law of the State of incorporation to all issues arising under these contracts might become repugnant to the salutary recognition given by the Supreme Court in procedural and other matters to dominant policy considerations of the State of the forum. (Address: Illinois Law Review, Northwestern University School of Law, Chicago, Ill.; price for a single copy: $1.00.)

CONSTITUTIONAL LAW—*"Jury Service as a Privilege of Federal Citizenship":* The March-April issue of the *Illinois Law Review* (Vol. 43—No. 1; pages 105-111) notes approvingly the decision in *Bomar* v. *Keyes,* 162 F. (2d) 136 (C.C.A. 2d, 1947) *certiorari denied,* 332 U. S. 825, 68 Sup. Ct. 166 (1947), which held that absence for service on a federal grand jury is not cause for the discharge of a teacher who is in probationary status. The "note" discusses the origin of the "privilege" of jury service, and concludes that the Court correctly protects it with the Civil Rights Act rather than with the general privileges and immunities clause of the Fourteenth Amendment. The problem of original federal jurisdiction is also considered, and the author reasons that original federal jurisdiction exists in any suit in which is alleged a violation of the Civil Rights Act, even though the $3,000 amount is not alleged. (Address: Illinois Law Review, Northwestern University School of Law, Chicago, Ill.; price for a single copy: $1.00).

CONSTITUTIONAL LAW—*"Concluding the War—The Peace Settlement and Congressional Powers":* Although the President as Commander-in-Chief has the responsibility for the temporary military government of occupied enemy terri-

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

tory, the permanent policy and relationship of the United States to Germany involves specific Congressional powers. The nature of such powers is discussed in a timely and well-considered article in the July issue of the *Virginia Law Review* (Vol. 34—No. 5; pages 553-568), by J. W. Brabner-Smith, recently a member of the MG Staff in Germany ment. He is strongly of the opinion that, without the concurrence of the Congress, it is beyond the constitutional power of the Executive to dispose of property or territory captured by our military forces or to bind the government to adherence to any understanding in respect thereof. He urges, therefore, that no further permanent undertakings on behalf of this nation be made or permitted by the President until the Congress has considered every phase of a final settlement and a policy has been adopted which is mutually satisfactory to both of these branches of government. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25).

CORPORATIONS—*"The Close Corporation and the Law":* The desire of participants in a close corporation to equate the scheme of the governance of their enterprise to that of a partnership poses many a problem for the alert lawyer. The extent to which this equation may more readily be implemented under legislation such as the new Section 9 of the New York Stock Corporation Law (added by Chapter 862 of the Laws of 1948, effective September 1, 1948) is discussed in an informative article in the June issue of the *Cornell Law Quarterly* (Vol. XXXIII—No. 4; pages 488-506) by Carlos D. Israels, visiting Lecturer in Law at Columbia University and author of various studies in the field of corporation law. Although based on a recent New York enactment, Mr. Israels' contribution contains material that may be of interest to lawyers in other States if they have like problems for clients. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00).

CORPORATIONS—*"Voting Trusts and Irrevocable Proxies":* A "comment" in the June issue of the *California Law Review* (Vol. 36—No. 2; pages 281-289) concludes that recognition of the validity of irrevocable proxies, combined with statutory protection to take the place of revocability, would provide a direct and efficient approach to the objective of safeguarding holders of voting trust certificates from possible abuses resulting from separation of voting power from beneficial ownership of corporate shares. As protective devices, the author suggests the imposition of limitations upon the purposes for which a voting agreement may be formed, the authority which may be delegated to voting representatives, the conduct of voting representatives, and the duration of the voting agreement. It is submitted that these safeguards should be considered as not only supplements to the recognition of irrevocable proxies, but also in connection with any amendment of existing voting trust statutes. (Address: California Law Review, University of California, Berkeley, Cal.; price for a single copy: $1.25).

TAXATION—*Federal Estate Tax—"The Revenue Act of 1948":* Since the enactment of the 1948 Revenue Act last April, there has been a steady stream of writings which expound and throw light on the revolutionary provisions respecting the income and estate taxes of married persons. The *Virginia Law Review* for July (Vol. 34—No. 5; pages 501-525) contains the first installment of an analysis and exposition by Robert T. Molloy and Robert L. Woodford, of the New York Bar, which deal with features of the new law. Although their article is limited to the estate tax provisions of the statute, it will be found unusually lucid and helpful to the practitioner who needs or wishes to acquaint himself with the new marital deduction. Our readers will note approvingly that our Association's part, through its experienced Section of Taxation, in drafting and bringing about the enactment of the new law, is given due recognition by the authors. Speaking philosophically, it is interesting to take note and account of the possibly far-reaching significance and consequences of the legislation. It appears to be based on more soundly American concepts and objectives, as to the incidence and impacts of tax burdens still inescapably oppressive and deleterious, than some earlier and socializing measures to "soak the fortunate" (who have few votes and are politically ineffective) and "spread the wealth". (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25.)

TAXATION—*"Federal Taxes and the Family: The Revenue Act of 1948":* In the July number of the *Southern California Law Review* (Vol. XXI—No. 4; pages 331-343), John W. Ervin, Associate Professor of Law at the University of Southern California, analyzes the opportunities presented by the Revenue Act of 1948, perhaps primarily for tax payers who are California residents or property owners. He concludes that community property laws still provide the greatest flexibility in estate planning. Regional considerations do not limit the value of the author's views, especially those as to the tax disadvantages of joint tenancies, the pitfalls inherent in the "terminable interest rule", and the need for estate planning based on detailed and continuing knowledge of economic facts as well as details of the client's affairs not previously indispensable to the lawyer advising as to wills and estate taxes. Professor Ervin predicts that the 1948 tax legislation will give rise to much litigation, to extensive amendments of its provisions, to an increase in the use of trusts, and a shift in intra-family property transfer from husband to wife to other areas of the family, and a parallel shift in the field of intensive tax litigation. (Address: Southern California Law Review, 3660 University

Avenue, Los Angeles 7, Cal.; price for a single copy: $1.00).

TORTS—*"Recent Developments in the Law of Privacy"*: An interesting and very useful exposition of law and decisions on right of privacy throughout the United States is in the July issue of the *Columbia Law Review* (Vol. 48—No. 5; pages 713-731). In it Wilfred Feinberg, lately Editor-in-Chief of that review, member of the New York Bar, has collated most, if not all, of the cases decided over the last decade in those jurisdictions where rights of privacy are not governed by statute. His observation and conclusion are that the existence of a common law right of privacy is more firmly established now than it was ten years ago and this trend is likely to continue and be accentuated, particularly in view of the commercialization of such new means of communication as television and facsimile newspapers. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: $1.00).

TRUSTS—*"Accounting for the Income from a Testamentary Trust"*: Good reason for careful planning and draftsmanship with relation to the meaning of the term "income" in testamentary trusts is given by Vol Gene Edmondson, Associate Professor of Accounting at the University of Oklahoma, in the initial issue of the *Oklahoma Law Review* (Vol. 1—No. 1; pages 32-48). In treating this ever-present problem in the administration of a testamentary trust, he takes the more common forms of trust property and shows the determinations arrived at by statutes and Court decisions as to the apportionment to be made in each instance analyzed. The appearance of such an article in the first issue of a new review gives promise for its emphasis placed in the thinking and scholarship at the law school which has sponsored its genesis. (Address: Oklahoma Law Review, Norman, Okla.; subscription price: $5.00 per year).

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman.

Failure to Report Income Constructively Received

■ The First Circuit of Appeals, in an opinion written by Supreme Court Justice Frankfurter sitting as a Circuit Justice, has ruled that a salary constructively received when earned but not reported by a cash basis taxpayer cannot be treated by the Commissioner as income in a later year unless there is a clear showing of factual misrepresentation. *Ross* v. *Commissioner* (Prentice-Hall, par. 72,557). The decision carries the doctrine of "constructive receipt" to its logical conclusion. This doctrine has the effect of taxing income not actually received by a cash basis taxpayer if the amounts are credited to the account of the taxpayer or set apart for him and may be drawn upon at any time (Treas. Reg. 111, Sections 29. 42-2, -3).

From 1924 through 1932 the taxpayer withdrew only a part of his compensation, leaving about $30,000 to his credit on his employer's books. In his income tax returns for these years he included only the salary which he actually received in cash. Most of the $30,000 credit, which remained on the employer's books until 1939, was withdrawn during the three years 1939-41 along with the taxpayer's current salary. However, only the latter was reported for income tax.

The Tax Court sustained the Commissioner's determination that the 1939-41 cash withdrawals should be taxed in those years even though they were earned and credited to the taxpayer's account in years prior to 1933, years barred by the statute of limitations. The First Circuit reversed on the ground that these credits were constructively received and hence taxable in the earlier years. The doctrine of constructive receipt is a rule of law, according to the Circuit Court, not an election which the Commissioner may invoke or not as he chooses. The Court found no basis for an estoppel. "A mere failure to report income is not a representation that such income has in fact not been received."

Of course, if a taxpayer is fraudulent minded, the statute of limitations will be of no help as there are no limitations on fraudulent returns.

Mimeograph 6293 — A New Procedural Safeguard

Another recommendation of our Association's Section of Taxation was adopted on August 5, 1948 with the issuance by the Bureau of Internal Revenue of Mimeograph 6293. These instructions to the Bureau's field offices in effect grant to taxpayers and their representatives an additional opportunity to be heard in connection with the administrative settlement of income, estate and gift tax liabilities.

Issues are often presented in the course of a revenue agent's examination which cannot be resolved in the field. Such issues are referred to Washington for advice and decision. In the past the taxpayer's counsel was frequently not advised of the fact that the Washington office had been

consulted until an adverse decision was communicated to him. He was given no opportunity to present his arguments to the officer responsible for the decision. Needless to say this was a most frustrating experience.

The recent Mimeograph, issued in response to our recommendation, corrects this situation. When the revenue agent in charge decides that a return involves "an issue requiring technical advice from the Bureau", the taxpayer or his counsel is to be advised that the issue is to be referred to Washington and that if desired "a hearing will be granted in Washington, in the event of an adverse decision", before a representative of the unit having jurisdiction of the matter. An opportunity is also to be afforded to submit a brief on behalf of the taxpayer "of the facts, law, and arguments, which brief will be transmitted to Washington as an attachment to the letter requesting advice on the issue".

If the decision in Washington on the record is adverse to the taxpayer "the Washington office concerned will advise the taxpayer or his representative of the time and place of the hearing".

The Mimeograph is not applicable where the issue relates to "matters primarily of internal concern" nor to "cases involving fraud or jeopardy assessment".

The credit for initiating this procedural safeguard goes to the Section's Committee on Bureau Practice and Procedure, headed by Robert Ash. The officials of the Bureau are to be commended for recognizing its fairness and putting it into execution.

Testamentary Trusts and the Income Tax

The importance of considering income taxes in connection with the drawing of wills is illustrated by the recent case of *Annie Inman Grant,* decided by the Tax Court on August 17, 1948 (11 T.C.—No. 26). The decedent's will established a testamentary trust for the benefit of his wife (the taxpayer) during her lifetime, and after her death for his children and grandchildren. The trustees were directed to pay the wife at the end of each year "all or any part of the net income . . . that my wife may elect", any part not drawn down by the wife to be added to corpus. The wife and one of the decedent's sons were named as trustees.

The taxpayer's wife never took any of the income, and something over two years after the decedent's death she executed a formal renunciation of her income interest. The Commissioner of Internal Revenue determined that all net income received by the trust prior to the date of the renunciation should be taxed to the wife. The Tax Court approved this determination.

Section 162 of the Code taxes to the beneficiaries of a trust the portion of the trust income required to be distributed or, in the case of a discretionary trust, the portion actually distributed, the balance being taxed to the trust. These provisions were apparently inapplicable since no income was actually distributed to the wife and none was required to be paid to her unless and until she requested it. The Commissioner relied on the broad sweep of Section 22 (a), the catch-all section which taxes each person on his income "derived from any source whatever". The income of this trust was taxed to the wife on the theory that it was hers, since she had the unrestricted right to reach out and take it. Under such circumstances the trust is not recognized as a separate entity.

The result would probably have been different if the trustees had merely been authorized in their discretion to pay the wife such portion of the income as she might need for her support and maintainence, especially if the wife were not included as one of the trustees. This would create a discretionary trust under which she would be taxed only on the income actually distributed to her.

The Tax Court rejected the argument that the wife's renunciation should be given retroactive effect, although it of course relieved her of income tax liability from the date of its execution. It should be noted incidentally that such a renunciation, or even a failure to draw down money before a fixed date, often has the effect of transferring a valuable property right or interest to other beneficiaries or remainder men and may as a consequence raise gift tax problems. No such question was involved in the instant case.

(See editorial on page 917)

Bar Association News

Richard B. Allen • Editor-in-Charge

California and Arkansas Get State Bar Awards

■ At the final session of the Assembly at the 71st Annual Meeting of our Association, at the Civic Auditorium in Seattle on September 9, the annual wards for excellence among State Bar Associations were presented to the State Bar of California in the large State Bar Association grouping and to the Bar Association of Arkansas in the competition among smaller State Associations. The Columbus (Ohio) Bar Association garnered the award in the local Bar Association division.

The awards, made under the sponsorship of the Section of Bar Activities and decided by a committee within that Section, are highly-prized manifestations of the interest taken both by our Association and by citizens generally in the public-spirited activities of State and local Bar Associations. The diligent efforts and keen rivalry in some of the groups indicates the intense activity which is taking place within organizations of all sizes and in all localities through the agency of the organized Bar. Paul B. DeWitt, of New York, Chairman of the Section, bestowed the awards before a large and enthusiastic Assembly meeting.

In giving the award to the State Bar of California (integrated), Mr. DeWitt emphasized the organization's activity in the field of public relations and in community relations work, where the aim has been to bring the story of the State Bar and the public service rendered by lawyers home to the local people in a friendly, neighborly fashion. He said California's was probably the first Bar to cooperate with the extension division of a State University in establishing a post-admission education program on a permanent and systematic basis (33 A.B.A.J. 952; September, 1947). Also, the California Bar has worked unremittingly to suppress unauthorized practice of the law. Especially mentioned in the presentation were the programs for improved standards of admission to law school and for betterment of the training given at such schools. During the year the State Bar appropriated $20,000 for a survey of law schools in California, such survey being made by out-of-State lawyers experienced in the field.

In receiving the award among the smaller State Bar Associations (those in States having a lawyer population of less than 2000), the Bar Association of Arkansas was cited for its labors in drafting a complete probate code for the State based on the Model Probate Code and for its support of a judicial reorganization plan that will upon adoption unify and improve the Court system of Arkansas.

A number of accomplishments were listed in the presentation of the local Bar Association award to the Columbus (Ohio) Bar:

(1) It conducted an Institute on Federal Taxation, an Institute on Practical Legal Problems, and twenty-seven educational luncheon lectures;

(2) It prepared and presented sixteen radio broadcasts, entitled "Your Lawyer and You";

(3) It conducted joint conferences and joint meetings with realtors, trust officers, accountants, life underwriters, and physicians;

(4) It drafted proposed new rules for the United States District Court for the Southern District of Ohio;

(5) It prepared and circulated a handbook for jurors in cooperation with the judges of the Franklin County Court of Common Pleas; and

(6) It operated a lawyers' reference service and cooperated in furnishing free legal aid to those who were in need of it.

As usual, the winning Bar Associations had many close and worthy competitions, and selection for the 1948 awards was truly difficult. The data submitted by all of the Associations which sought the honor of the awards made a most impressive and convincing demonstration of the rekindled spirit and diligent purposes which increasingly animate the organized Bar of America. Nearly all of the State and local Bar Associations are now "on the march".

National Bar Association Organized in China

■ While we chronicle the multiplied activities of Bar Associations—national, State and local—in these pages of the JOURNAL, it is refreshing to receive word that the Bar of a great nation identified in ideals with our own is organizing itself to assist more adequately the tasks of improving the administration of justice and the science of jurisprudence. Dean Roscoe Pound, distinguished member of our Association whose latest service is in advising the Ministry of Justice in China in the establishment of Courts and the modernization of the system of law in that far-away country (34 A.B.A.J. 273; April, 1948), has sent us the following inspiring account of the organization of the National Association of Bar Associations in China:

"The *Chinese Handbook* (1945 edition) names but one organization in China having to do with law, namely, the Law Society of China, a learned society founded in September, 1945, 'to do research in law for the improvement of the Chinese legal and judicial system'. Nothing in the way of a Bar Association is noted in this book, nor in the *Chinese Yearbook* for 1944-45 (the last issue).

"Local Bar Associations, however, go back to the old days of the Consular Courts, and with the establish-

ment by the Republic of a modern organization of Courts and modern administration of justice under modern codes, such Associations were formed elsewhere. There was also a national organization before the war, but what had been achieved in that direction was undone during the Japanese occupation.

"In the general reconstruction since the war the national organization was to be revived. But a new organization became necessary because of the Statute of 1945 governing the admission, organization, and discipline of advocates. Under that law all advocates must be members of a Bar Association. Where there are fifteen or more registered in a judicial district, they must set up a Bar Association. If fewer, they must join the Bar Association of a neighboring district, or the districts may set up a joint Bar Association. The statute also provides that a National Bar Association may be set up at the suggestion of seven or more local Bar Associations with the approval of half of the local Bar Associations of the country. The Statute contains what is in effect a Code of Professional Ethics in some twenty articles and provides a disciplinary system to enforce the Code.

"Accordingly, an organization meeting of a National Association of Bar Associations was held in Nanking on September 9-13. At the first session Professor Tai Siu-Chan, of the faculty of law of the National Central University, presided. A message from the President of the Republic was read, which appreciated the role of the lawyer in stabilizing society and emphasized the task of the lawyer and so of the organized Bar in upholding law and justice according to law.

"A representative of Dr. Wang Chung-hui, President of the Judicial Yuan, the highest judicial organ in the national government, spoke of the contribution which organized lawyers can make to the administration of justice because of the variety of lawyers' contacts and the extent of their experience. It should be noted in passing that the 'grand justices' in the Judicial Yuan have the ultimate authority only to interpret the Constitution and pass on the validity of legislation and administrative ordinances claimed to contravene the Constitution.

"Dr. Hsieh Kwan-sheng, Minister of Justice, spoke of the importance of cooperation of the Bar, as one arm of justice, with the Courts and the administrative authorities in upholding the law. This is especially needful in a time of reconstruction and the national organization of lawyers is therefore timely.

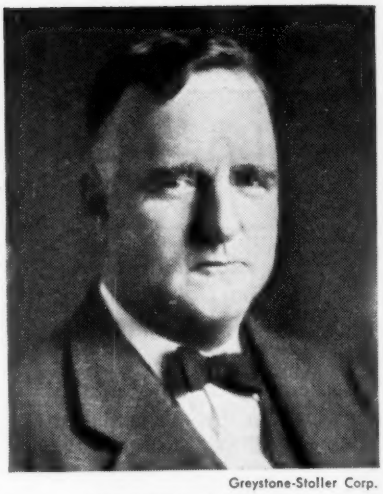
"The President of the Administrative Court, Dr. Chang Chi-peng, said that the date 'double-nine' (the ninth day of the ninth month) was, according to old Chinese ideas, an auspicious one for new undertakings and so he prophesied a good future for the Association."

Dean Pound, adviser to the Ministry of Justice, then gave to the meeting the benefit of his statement of "American Experience of Bar Associations". He set forth the organization of our profession at the time America was colonized, the Bar Associations in Colonial America and after the independence, and the history, organization and achievements of the American Bar Association. Dr. Yang Chao-lung, director of the Criminal Bureau of the Ministry of Justice, interpreted. Details of the organization of China's promising new force for an independent and effective profession were taken up in later sessions.

Alabama Bar Attracts Its Largest Attendance

Adoption of a strongly-worded "States' rights" resolution marked the 1948 meeting of the Alabama State Bar, which drew a record attendance to its convocation held in Montgomery on August 6-7.

W. Howell Morrow, retiring President of the State Bar, sounded the "States' rights" convictions held deeply by lawyers, in a ringing address about it and the relation of the Bar to it. At the business session the following resolution was unanimously adopted:



Greystone-Stoller Corp.

GESSNER T. McCORVEY
President, Alabama State Bar

RESOLVED BY THE ALABAMA STATE BAR:

1. That we do hereby declare our adherence to that concept of government, founded upon our federal Constitution, under which the several States are sovereign in all matters not expressly granted to the United States;

2. That we do hereby declare ourselves opposed to any encroachment by the federal government upon those fields of legislation reserved by the States to themselves;

3. That we do hereby declare our belief that among the matters which should be dealt with solely by States, each for itself, are (a) the qualifications of voters, (b) the segregation of the races, (c) the right of citizens to choose their own associates and employees, and (d) the punishment of crimes not related to the federal government.

Speakers on the Bar's two-day program included J. Mac Jones, of Montgomery, who delivered the address of welcome; W. O. Walton, who responded; Frank A. Constangy, of Atlanta; Frontis W. Johnson, of Davidson College; and Judge Lee B. Wyatt, of the Supreme Court of Georgia.

Gessner T. McCorvey, of Mobile, was elected President of the State Bar for the ensuing year by acclamation. McLean Pitts, of Selma, and Calvin Poole, of Greenville, were elected First Vice President and Second Vice President, respectively. Lawrence F. Gerald, Sr., of Clanton, was renamed as Secretary.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Sees Powerful Forces Working To Destroy Democratic Institutions

■ I have never before written a letter with reference to editorial expression to any journal of any kind, whether representative of the daily press and intended for the consumption of laymen or representative of and intended for members of a certain profession.

The lead editorial in your August issue [page 696], however, entitled "The Point Where Toleration Ends", is such an outstanding example of clear statement upon a most timely and vital subject that I am yielding to the impulse to write this letter of my appreciation and to give expression to the hope that it will strike a similar response in the opinion of many other lawyers who are members of our Association.

Lawyers who read the JOURNAL must be struck by the quotation from the address of retired Associate Justice Owen J. Roberts, in the excerpt from his address to the Pennsylvania Bar Association, carried on the outside of the front cover of your August issue.

It seems so clear that powerful forces in this country are working to use democratic processes, evidently with the end in view of the destruction of democratic institutions, that it must become a challenge to all those interested in the perpetuation of traditional American democracy not to suffer the ideas so vigorously and clearly expressed in this editorial to lapse into silence and inaction.

RICHARD K. PHELPS
Kansas City, Missouri

Sees the *McCollum* Decision as Prohibiting "Free Exercise" of Religion

■ We have read with considerable interest the editorial in your June issue (page 482) concerning the decision of the Supreme Court in the *McCollum* case, and we accept your invitation to discuss the result and importance of that decision.

We believe that this recent decision must be considered from two points: The first of these is moral. Certainly the United States of America is a nation that was organized and has prospered under its faith in God. Under the *McCollum* decision, it is unconstitutional to teach children religion in any manner or form during school hours. Will not this policy produce, in a few years, a generation of young men and women without the moral training and belief necessary to lead this country and the world to an equitable adjustment of the differences existing among nations today? Will not these young people, as they assume control of our country, be definitely antagonistic to every type of religion?

The early days of the United States often found subtle or open religious persecution by groups which happened to be in a majority in a particular locality. Under the policies set forth by the Supreme Court, they practically guarantee that the United States will shortly be governed by a majority group which does not believe in God. Will not this group then attempt to alter our freedom by enlightening the "poor misguided souls" who still cling to their faith and their belief in the age-old values?

These presumptions and suppositions are not so far-fetched or so remote as many would believe them to be. Each action follows closely after the preceding one, and the impetus given by the Supreme Court to those who would destroy our religious freedom will be difficult to halt.

The second viewpoint in this regard is one based strictly upon the laws and the Constitution of the United States. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". These provisions have been extended to the several States by the Fourteenth Amendment. The purpose of the Amendments was to guarantee to all people in this country the right to practice their religion to the full extent of their ability and desire. Likewise, the Amendments guarantee that any person may refrain from practicing religion of any type. In almost every State of this country, children between certain ages are required to attend schools regularly. Does the Constitution of the United States prohibit the free exercise of their religion during these periods? Does the Constitution of the United States prohibit these children from attending parochial schools which combine religious instructions with secular studies during the hours when the State law requires that they attend school? As yet, no Court has dared to go this far; but does not the *McCollum* decision take a long stride in that direction? The prohibition by the Supreme Court of any agreement between all religions to provide religious instruction for young people who so desire constitutes, in our opinion, the prohibition of the free exercise of religion.

We believe that a careful review of the writings of Thomas Jefferson, Alexander Hamilton and others of their day will show that such was not the intent of the framers of our Constitution. There have been many excellent works discussing the intentions and purposes of the framers of the Constitution and the Supreme Court in its decisions has often probed the intentions of those great leaders of the infant republic. It is impossible for us to reconcile the previous views of the Supreme Court in this regard with their more recent action in the *McCollum* matter.

It is regretted that this letter is so lengthy, but we feel that this matter is of the highest importance to our nation, to our children and to our fundamental religious beliefs. We earnestly solicit your support in this cause, and we extend to you an offer of our services should your Association desire to file a brief *amicus curiae* in opposition to the position taken by the Supreme Court in the *McCollum* case.

CHARLES I. DENECHAUD, JR.
RICHARD C. MEUNIER
New Orleans, Louisiana

Says *McCollum* Case Overlooks Plain Language of the Constitution

■ I want to thank you for the courage and intelligence of your editorial: "No Law But Our Own Prepossessions"? [34 A.B.A.J. 482; June, 1948]. The *McCollum* case is a brazen, vicious attempt to legislate something new into the Constitution by the device of overlooking the plain, clear language used in the Constitution, and substituting for it the obscure, vague, unevolved and anti-religious so-called "principle of separation of church and state". The next step we can expect is to have some atheist bring suit before the Supreme Court to remove from the Declaration of Independence the statement that all men are endowed by their Creator with certain unalienable rights.

I served nineteen months overseas in the first World War. It is a splendid thing that lawyers are showing sufficient patriotism and courage to challenge the attack made by the Supreme Court upon belief in God and upon our United States Constitution. The *McCollum* case does what the Constitution says must not be done: give preference to one religion and that religion is the religion of negation. Atheism is a religion, which says there is no God and that Jesus Christ never existed. Atheism can be taught in the schools and is taught there. No wonder some of the religious groups have their own schools.

Z. L. BEGIN
Marshall, Minnesota

Would Like a Study of Trends in State Courts

■ In the July JOURNAL (page 554) under the title "Dissents and Overrulings: A Study of Developments in the Supreme Court", by Ben W. Palmer, of the Minnesota Bar, I find a scholarly analysis of the developments and trends of the Supreme Court of the United States. In the same issue (page 535) Justice Robert H. Jackson, in an address to the American Law Institute, stated in a humorous vein: "You represent the legal profession in a great undertaking to restate the law; I am sure it has not escaped your attention that the institution of which I am a member is actively engaged in the same enterprise".

Following this, I read a book written by Wilfred Parsons, S. J., under the title *The First Freedom,* published by the Declan X. McMullen Company. It is devoted to considerations on church and state in the United States. Cataloging this work is difficult; the nearest I can come to it from its framework is to call it a brief. It is definitely partisan, but not emotionally so. It is not homilitic in its characteristics, although the mind of the theologian is exposed in a few places. It is invitational in its make-up, in that it should encourage arguments from the other side. Father Parsons has given careful, intelligent study for presentation of an important subject at a critical time.

For one who is interested in trends, as revealed by Mr. Palmer, the book has a compelling interest. I hope that someone with ability to do so will soon give us an analysis of trends of State Court decisions.

Someone in this Court recently observed that from trends "advice of counsel and trial of lawsuits is comparable with the parlor game of pinning the tail on the donkey". From my own observation, I repeat the question so often asked by my colored handyman: "Whur we gwine?"

DAVID J. HEFFERNAN
Civil Court of Record,
Dade County,
Miami, Florida

Author of *Blackstone and White Rock* Replies to Nat Schmulowitz's Review

■ Nat Schmulowitz, of San Francisco, has been kind enough to send me an advance manuscript copy of his review of my book, *Blackstone and White Rock* [34 A.B.A.J. 937; October, 1948]. In his accompanying letter he offered to extend his comments further if I so desired, but I believe it would serve his purpose better if he were to do so publicly.

I am surprised, since he apparently did not like my book, that he devoted more space to it than was originally given to a review of Blackstone himself. I suspect, indeed, that Blackstone might have received short shrift from Mr. Schmulowitz, on the ground that his mind failed to tag along behind the established if antiquated *mores* of his times. Certainly he refused to accept precedent or a viewpoint simply because it was precedent or a viewpoint. Similarly, and at the risk of presuming to align myself with Blackstone's wisdom (which, believe me, I do not intend), I find little patience with my colleagues who accept uninquiringly and indiscriminately every illusory phase of a lawyer's character and life. We are, I think, a pretty lusty breed, regardless of the austere dignity we attempt to palm off on our clients; and those of us who have fallen victim to our own propaganda are blindly unrealistic.

I am pleased that Mr. Schmulowitz finds I have a sense of humor, but I regret I cannot return the com-

pliment. For Mr. Schmulowitz my book is a literal and apparently savage attack on the profession; he speaks of my "diatribes against the legal profession" and says that nothing in my book "enriches the mind or increases its treasure or causes it to advance a single step". No fair reviewer, I am sure, would consider my kidding of the profession in the nature of diatribes, and why Mr. Schmulowitz felt he should have his mind enriched by my book is something I cannot understand.

On second thought, Mr. Schmulowitz's mind should have been enriched. He would have found, if he had paid attention, that all books are not to be taken literally, that occasionally one comes along in which the art of exaggeration is employed to needle people like Mr. Schmulowitz, who fell neatly into the trap. But why he insists inferentially that all books must enrich the mind or increase its treasure—why all books must be taken soberly and seriously—indicates rather clearly a bit of musty thinking.

Mr. Schmulowitz ought to relax and not take himself quite so seriously, or, for that matter, the world and profession he squints at from his prefabricated ivory tower.

A lapse in Mr. Schmulowitz's talent for quoting from my book confirms what I have been saying. He quotes me as asserting that my book "is the most complete and truthful autobiography ever written" but fails, curiously enough, to add the qualifying clause which immediately follows: ". . . containing not only things that happened to me, but many things that might or could have happened to me". I don't think Mr. Schmulowitz would intentionally quote me out of context, but I'm afraid he didn't get the point. Either that or his lapse is explainable only be referring to Freud, who explained this and kindred lapses. Mr. Schmulowitz will find Freud very serious and enriching reading, and I recommend that he try him. . . .

Mr. Schmulowitz also complains of my language. I should think he might have spared the profession this rather naive complaint. I know nothing of activities or dialogue as they occur in Mr. Schmulowitz's quaint little world, but in most law offices the language which mingles with the cigar smoke as lawyers attempt to wrangle more advantageous deals for their clients is not precisely reminiscent of a seventeenth century drawing room. I think it unfair to blame me for reporting the nasty words my ears hear—the blame lies, I am sure, in this *status quo* world which Mr. Schmulowitz so dearly loves and unfortunately sees through rose-colored glasses.

Finally, I am glad that Mr. Schmulowitz "suspects" I may be kidding. There is perhaps still hope that he is catching on.

MILTON L. FARBER
Columbus, Ohio

What President Was Seven Years a Judge But Not a Lawyer?

■ I have just read the address of Mr. Justice Frankfurter in the August JOURNAL [page 656]. Please permit me to join the "Quiz Kids" class long enough to ask: Which one of the eleven outstanding Presidents named by Justice Frankfurter was a judge though not a lawyer?

So far as I know, George Washington is not mentioned in any biography or history as having been a judge. However, I do remember reading in the JOURNAL a few years ago that George Washington was a judge in his county for some seven years.

While many lawyers on occasion feel, and some judges will admit, that all judges are not lawyers, yet Mr. Justice Frankfurter on a rehearing might concede that a mere judge is so nearly akin to a lawyer as to become an "expert in relevance".

Of course, Justice Frankfurter's statement is correct; but I would like to see the JOURNAL again emphasize the fact that in addition to the many more publicized ways in which George Washington served his country, he also served many years as a judge, with civil and criminal jurisdiction, in his native State of Virginia. Apparently that is a fact known to few lawyers and to almost no laymen.

FRANK C. DUNBAR
Columbus, Ohio

Commenting on Courts' Disregard of Rules of Law Long Settled

■ I note from time to time in the biographical sketches of our judicial officials reference is made to their attitude towards the *stare decisis* principle, and that in a number of instances, as in the current sketch of Judge Rossman [34 A.B.A.J. 364; May, 1948], it is found that the judges have indicated little regard for it. If there is one thing above another that is responsible for our overcrowded dockets it is the violation of that principle. It has about come to the point that with every new set of judges we have to re-educate ourselves, as each new set seems to be a law unto itself.

In view of this fluid state of the "law", everyone figures that he has a chance to remake the law, and consequently many cases are brought that would not be brought if the litigants knew that *stare decisis* was still an observed principle. It used to be said that certainty in the law was of utmost importance, but that seems no longer to be true. One, in this connection, recalls the tart dissent of Justice Roberts, that the decisions are like railroad tickets stamped good for this day and train only. That is a most unhealthy state of affairs, and it is hoped that when these eccentric judges deride or ignore this doctrine of stability they will not be spoken of with approval. When the law is once enunciated by the appellate Courts it should remain the law until changed by the lawmaking authority. Less harm would be done by standing by even a doubtful decision than by the Courts constantly shuttling back and forth in their weaving of the law.

GEORGE WASHINGTON WILLIAMS
Baltimore, Maryland

[EDITOR'S NOTE: The JOURNAL'S sketches of jurists, federal and State, have in each instance endeavored to take into account whatever has been indicated to us regarding the char-

acteristics of the judicial work and juridical philosophy of the particular judge portrayed, as viewed and appraised by those who have known and analyzed what his opinions reveal. In making such a presentation, we neither approve nor disapprove the particular characteristics portrayed; our opinion of any of them, in relationship to a sound juridical philosophy, has been given in our editorial columns.]

Approves Statement on Individual Rights

■ You asked for reader comment on "The Tragic Doubts of Men as to the Source of Their Individual Rights" [August issue, page 654]. I loved every word of it. I believe it needs to be said over and over again that the state is not God. Any nation, even ours, is great only as it follows God's will. It is the duty of every living person to follow God's will as he sees it, and to help interpret God's will to his country. Let us never lose sight of that fact.

STANLEY U. ROBINSON, JR.
Columbus, Ohio

Imputation of "Witch-Burning" Should Have Been Repelled

■ It is too bad that the editor of the JOURNAL failed to append to the communication of John P. Kohn, Jr., [August issue, page 729] a note which would serve as one more effort to dispel the absurd belief that there was any "burning of witches" under sanction of law, at any time, anywhere in this country.

DONALD K. MACKAY
PRESIDENT, QUINCY BAR ASSOCIATION
Quincy, Massachusetts

[EDITOR'S NOTE: We share Mr. Mackay's regret for our omission. Our own extensive reading on the subject sustains his view. Our comment on Mr. Kohn's contribution was intent on the main issue which he raised.]

1
71st Annual Meeting

(Continued from page 862)

ration on Human Rights and the Draft Covenant on Human Rights. In this latter regard, the Committee was given authority to continue and extend our Association's cooperation with the similar committee of the Canadian Bar Association as to these documents, looking to a joint study and joint recommendations. That Association had also taken action as to these documents at its meeting in Montreal at the end of August, as reported elsewhere in this issue.

Other Decisions by the House as to Association Policies

Acting to implement the findings and recommendations of our Association's delegation to the National Conference on Family Life, held in Washington, D. C., on May 5-8 (34 A.B.A.J. 448; June, 1948), the House voted (1) to urge appointment by the President of the United States of a commission of ten members to study marriage and divorce laws; (2) to urge the extension of family Courts; and (3) to establish a new Association Committee to be known as the Committee on Divorce and Marriage Laws and Family Courts.

Two newly drawn Acts from the National Commissioners on Uniform State Laws were approved by the House. They are the Uniform Enforcement of Foreign Judgments Act, which provides for the registration of foreign judgments and for proceedings thereon, and the Uniform Divorce Recognition Act, which is designed to clarify the issue of domicile and to establish a *prima facie* rule of evidence on the matter of residence.

As to legislation which was pending in the 80th Congress upon its adjournment, the House approved, in addition to H.R. 5852, the Subversive Activities Control Act (commonly known as the Mundt-Nixon bill), the Jennings bill (H.R. 1639) with amendments, as to the venue of actions, based on the tort liability of common carriers. H.R. 7154, which would transfer provisions dealing with the Tax Court of the United States to the judicial section of the United States Code, was also approved, with the exception of language which would permit all persons admitted to practice before that tribunal prior to September 1, 1949, to continue as practitioners before that Court "so long as they behave themselves". Such a provision was regarded as preventing the Tax Court from making its own rules as to those qualified and admitted to practice before it, and would have the effect of permitting accountants (who are not attorneys) now practicing before that Court to continue to do so, regardless of the Court's authority to decide who may practice before it. These objectionable features were opposed by the Committee on the Unauthorized Practice of Law. Legislation by the 80th Congress as to the Tax Court is discussed in connection with the article on "Teamwork in Tax Practice", elsewhere in this issue.

Resolutions Acted on as to the Courts of the United States

A resolution from the Committee on Jurisprudence and Law Reform, recommending the amendment of Section 21 of the Judicial Code (28 USC) to cover disqualification of judges on account of personal prejudice or bias, was approved. Another recommendation by this Committee did not fare so well in the House. This was a proposal that the Judiciary Article of the Constitution of the United States be amended to provide that the Supreme Court "shall have appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact, with such exceptions and under such regulations as it shall make". Four members of the

Committee dissented from the recommendation; and Frank W. Grinnell, of Massachusetts, one of the dissenters, spoke against its adoption in the House. After one of the liveliest debates of the sessions, the House refused to approve the proposal and it was referred back to the Committee, under circumstances commented on in "Editor to Readers" in this issue.

Consideration of a change in the Federal Employers' Liability Act was deferred until the mid-year meeting. The subject-matter had been referred to the Committee on Commerce and the Committee on Employment and Social Security, but the latter had not made a report.

Action on the matter, highly important to lawyers, of remedies for tax inequities arising under the federal Internal Reveune Code in regard to partnerships and sole proprietors, including lawyers, was regrettably deferred when no agreement among those who have been studying the matter could be reached and reported to the House.

The House (1) re-elected (without balloting) Robert R. Milam, of Florida, as a member of the Committee on Scope and Correlation of Work; (2) extended the activities of the enlarged Committee on Military Justice to include the Navy and Air Force as well as the Army; (3) reduced the membership dues in the Association to $3 per year for the first two years after a member's admission to the Bar, this to attract early applications for membership by young lawyers; and (4) deferred until its mid-year meeting action on the extensive amendments, some of them controversial, to the Constitution and By-Laws of the Association, which had been drafted and filed by the Committee on Rules and Calendar of the House of Delegates and published in the July JOURNAL at page 628.

House Defers Action on Individual Guilt Before International Courts and Police Forces

The vigilance which members of the House exercise as to proposals brought before it by interested Sections and Committees was exemplified anew in the interests of consistency and sound policy when the following was offered, which was said to have been approved unanimously by the Section of International Law and to be supported also by the Section of Criminal Law:

> RESOLVED: 1. That the effective administration of international law requires individual responsibility for its violation with competent Courts of compulsory jurisdiction for trial of such offenders and adequate enforcement of its decisions.
>
> 2. That the American Bar Association recommends to the United Nations that it take appropriate action to establish sufficient tribunals and enforcement procedure, including necessary police forces, to effectuate the above principles.
>
> 3. That the American Bar Association respectfully tenders its assistance in formulating provisions appropriate to the above ends.

Lively debate ensued—one of the most vigorous of the Seattle sessions. The proposal had evidently been drafted by Robert G. Storey, of Texas, with the status of international criminal law in mind. The creation of various international Courts to try individuals was sought. Its adoption was moved by Chairman Frederic M. Miller, of Iowa, of the Section of International and Comparative Law, supported by Captain James J. Robinson, of the Section of Criminal Law.

Former President Carl B. Rix, member of the Committee for Peace and Law Through United Nations, took the floor to explain implications which he said had not been taken into account by the proponents of the resolution. Violations of civil and private international law, as well as international law against crimes, were plainly covered by its broad wording. International police forces would be set up to act against individual citizens. The jurisdiction of even the World Court had been limited to nations, and the Association had declined to extend it to nationals. International responsibility and trial of individuals would have far-reaching consequences. To create more Courts and judicial offices in the international sphere when even the World Court has not enough business would not be justified. The passage of such a resolution would repudiate the position taken by our State Department, and by our Association last February, as to individual responsibility before new Courts for violations of the proposed Covenant or Declaration on Human Rights (for the action of the House, see 34 A.B.A.J. 277; April, 1948).

President Rix urged that for the House to favor so far-reaching a proposal would do great harm to international law and put our Association and its Committee in an unfortunate position before the United Nations. He urged that the proposal be at least held for further thought and study. His motion to defer was adopted.

Climax of a Successful Association Year

Appraised from the point of view of long-run considerations and given its place in the succession of years which mark the long forward march of our Association, the Association year which ended with the adjournment of the Seattle meeting deserves to be ranked as a sound and useful period in the annals of the organized Bar. It was a time during which our Association took stock of itself and caught up with itself, greatly improved many details of its administration and facilities, came to realize that it had to live within its means and could not undertake every project which was urged upon it, and did the planning and preparation for selected tasks of first importance. Preeminently this was a year of improved and sound attention to the Association's objectives and administration of the Association's business. For this President Gregory has justly received much credit.

Membership was healthily increased. As of July 1, 1947, the members in good standing were 40,209; as of July 1, 1948, their number was 41,262. At the adjournment of the Seattle meeting, the total was about 41,500.

W. E. Stanley, of Kansas, Chairman of the Ways and Means Committee, reported to the House in Seattle that the roll of sustaining members had been increased from 1043 to 1150—a gain of 107—during the past year. The balance in the Association's building fund as of June 30, 1948, was $77,928.02.

Although the Association year was not signalized by conspicuous controversies and major agitations in support of specific proposals, the preparatory work on several constructive measures was steadily advanced under the leadership and support of President Gregory and was auspiciously launched at the Seattle meeting, as other contents of this issue amply attest. This is notably true in the field of administrative law and procedure, as well as in the field of international law and the United Nations.

Canadian and American Lawyers Again Will Work Together

Among the memorable and significant aspects of our Seattle meeting was the presence of distinguished lawyers of Canada as honor guests, the agreeable hospitality extended to about a thousand American lawyers at scenic Victoria on September 10 by the Province Government of British Columbia, as shown elsewhere in this issue, and the action voted by our House of Delegates, paralleling that taken by the Canadian Bar Association in Montreal the week before, for joint studies and recommendations by the two great Bar Associations concerning the proposed Declaration on Human Rights. Details of this program are reported elsewhere in this issue, in connection with the action of the House of Delegates as to the Draft Declaration.

Manifestations of the cordial confraternity of North American lawyers were abundant. Immediate Past President John T. Hackett, K. C., M. P., of the Canadian Bar Association; Leonard W. Brockington, C. M. G., LL. D., K. C., the "golden voice of Canada" during the war; and President Mackenzie, of the University of British Columbia, added distinction to the meeting with their addresses. Chief Justice Wendell P. Farris, of Vancouver, and Dean George Curtis, of the Law School of the University of British Columbia, came over to join Mr. Hackett in conferences with President Holman and our Association's Committee for Peace and Law Through United Nations as to the work of the two Bar Associations through their respective committees. The presence of these distinguished guests from Canada, with their gracious ladies, was warmly welcomed by our Seattle hosts and by our members present. More than a few lawyers of Victoria and Vancouver came to Seattle to mingle with their brethren of the States and hear particular addresses.

It was justly regarded as a most happy augury that in these critical times in international relationships, the lawyers of Canada and the United States again were joining hands in a program of timely work related to international law—a cooperation which in 1944-45 was so effective as to the World Court and the Statute of the Court, culminating in the marked gains won by the two Associations in the Committee of Jurists in Washington and the San Francisco Conference of the United Nations. Although the new program relates immediately to one specific subject of major importance and broad potential impacts, it will doubtless reflect a team-work and a wider understanding on the part of the lawyers of the two countries that the future of Canada and the United States are indissolubly linked in mutual efforts for peace and law in the world and for the common defense of all nations in this hemisphere against totalitarian infiltrations and aggressions.

That these are parlous times was deeply realized by those present in Seattle. That Canada and the United States are putting forth mighty efforts and large expenditures to provide for the security of North America in the event of war was perhaps more manifest in the Pacific Northwest than in most other parts of either country. That Canada is a critical area for the continent under present contingencies, and that Canada was the first to cope openly and effectively with the Communist menace and did so under the leadership of distinguished lawyers, was much in the minds of lawyers of the States. It was reassuring to have again a tangible manifestation that the profession of law on this continent knows no barriers of boundaries and is aware that freedom in both countries may depend on the bulwarks erected by their Courts and by the devotion of their lawyers to the spirit and the institutions of law and liberty.

3 New Federal Judicial Code

(Continued from page 865)

In addition to its previous powers, it is now authorized to report its proceedings directly to Congress each year, submitting with its report any recommendations which it may have for legislation. (§331).

The administrative and fiscal autonomy of the federal Courts, which was initiated by the creation of the Administrative Office of the United States Courts in 1939, is continued and strengthened. Acting under the supervision and direction of the Judicial Conference, the Director of the Administrative Office not only studies and reports the state of the dockets of the several Courts but also fixes the compensation of the supporting personnel of the Courts, pays the expenses of the judicial establishment, and supplies it with its physical necessities. (§ 604). Thus within the limits of appropriations made by Congress, the federal judi-

ciary now handles all its fiscal and administrative business through its own agencies—the Judicial Conference and the Administrative Office.

Many Other Improvements Effected by the Revised Title 28

Among the many other improvements effected by the revision space permits mention here of only the following: The District of Columbia becomes one of the eleven judicial circuits, and the District of Columbia as well as Hawaii and Puerto Rico become judicial districts for all purposes. The Court of Appeals for the District of Columbia becomes a United States Court of Appeals, and the District Courts for the District of Columbia and for Hawaii and Puerto Rico become United States District Courts for all purposes (§§ 41, 88, 91, 119, 451). The judges in the District of Columbia become Circuit and District Judges, respectively (§§ 44, 133); and the Chief Justices of their respective Courts become Chief Judges thereof. The same is true of the Chief Justice of the Court of Claims and the Presiding Judge of the Court of Customs and Patent Appeals. (§ 2 of Public Law 773). The Chief Justice of the United States thus become the only Chief Justice in the federal judiciary.

The revision performs an act of simple justice to the retired federal judges, many of whom have continued to perform judicial duty but have not had the benefit of the salary increase granted two years ago. Hereafter a retired judge receives for the remainder of his lifetime the salary of the office and is not restricted as heretofore to the salary which he was receiving when he retired. (§ 371).

Changes in the Law and Practice as to Venue of Actions

Among the more noteworthy of the improvements in arrangement and clarity are those which have to do with jurisdiction and venue in the District Courts. Those provisions which relate to jurisdiction in the sense of the power of a District Court to hear and decide are placed in Chapter 85 while those relating to venue are put in Chapter 87. These chapters will repay careful study. As is inevitable in the case of any revision, litigation with respect to the construction and application of these restated provisions will doubtless follow their enactment. It is believed by the revisers, however, that the new language will prove to be clearer and more satisfactory in application than much of the language which it has replaced.

In Chapter 87 the venue in suits relating to orders of the Interstate Commerce Commission is simplified (§ 1398), and two wholly new provisions are included. One of these authorizes a District Court, for the convenience of the parties and witnesses, in the interest of justice, to transfer a civil action to any other district where it might have been brought. (§ 1404). It will be interesting to observe the operation of this statutory recognition and implementation of the doctrine of *forum non conveniens*. The other new venue provision requires a District Court to transfer a case in which venue has been wrongly laid to a district where it could have been brought. (§ 1406). Both provisions will protect many plaintiffs, whose cases would otherwise have been dismissed, from having their causes of action barred by the statute of limitations.

The provisions for removal of cases from the State Courts, which appear in Chapter 89, are amended so as to provide that the petition for removal shall be filed in the federal District Court to which removal is sought. (§ 1446).

The revision establishes uniform qualifications for jurors for all the District Courts, with the sole exception that persons who are by State law incompetent to serve as jurors in the Courts of a State may not serve in the federal Courts in that State. (§§ 1861, 1862).

Provision is made for the registration in any district of a judgment entered in another district which has become final. This is to be done by merely filing a certified copy of the judgment. (§ 1963).

Rules of Procedure and Practice in Admiralty Are Authorized

The Supreme Court is given power to prescribe rules of practice and procedure in admiralty cases which, after having been reported to Congress, shall supersede conflicting statutory provisions. (§ 2073). This follows the authority heretofore conferred on the Court with respect to rules for civil actions and criminal cases. Heretofore the admiralty rules could only fill in the interstices of the statutes. The necessity of having appeals allowed in admiralty and some other types of cases of a civil nature is eliminated. All appeals in all types of civil cases are to be taken by filing notice of appeal. (§ 2107).

The revision meets the problem presented by the occasional case which reaches the Supreme Court in which less than a quorum is qualified to sit. If the case has been brought by direct appeal from a District Court, it is to be remitted to the Court of Appeals for the circuit in which it arose and is to be heard either by the three senior Circuit Judges or by the Court *in banc*. In all other cases, if a majority of the qualified Justices thinks that the case cannot be heard by a quorum at the next term, an order is to be made affirming the judgment with the same effect as if it had been affirmed by an equally divided Court. (§ 2109).

Helpful Changes Made as to Habeas Corpus and Procedural Matters

Chapter 153 contains the provisions relating to habeas corpus. The old statutory law upon this subject had become almost completely encrusted with a gloss of judicial decisions. The revision restates the law as clearly as possible in accord with the decisions and follows in substance recent recommendations of the Judicial Conference, which were made after long study by a committee of which Senior Circuit, now Chief Judge, John J. Parker of the Fourth Circuit was chairman. (§§ 2241-2255).

Uniform provisions are made for the organization and procedure of

3 New Federal Judicial Code

all three-judge District Courts (§ 2284), and the provisions of the Urgent Deficiencies Appropriation Act of 1913 for the review of orders of the Interstate Commerce Commission by such Courts are expressly repealed and transferred to Title 28. (§ 2325).

Finally, by Section 36 of Public Law 773 (not a part of Title 28), Congress amended Section 1141 (a) of the Internal Revenue Code so as to make decisions of the Tax Court reviewable to the same extent as decisions of the District Courts in civil actions tried without a jury. This was done, as the legislative history clearly shows, in order to repeal the rule calling for a much narrower scope of review which was laid down by the Supreme Court in *Dobson* v. *Commissioner of Internal Revenue*, 320 U.S. 489.

Untiring and Expert Efforts by Individuals and Two Publishers

No account of the revision would be complete without some mention of the individuals whose untiring efforts made it possible. Initiated by the Committee on Revision of the Laws of the House of Representatives under the leadership of Chairman Eugene J. Keogh, the work was carried on in the 80th Congress by Subcommittee No. 1 of the House Committee on the Judiciary which, under the Congressional Reorganization Act, succeeded to the functions of the Committee on Revision. Chairman John M. Robison of Subcommittee No. 1 maintained until his death a very active interest; and his successor, Representative Chauncey W. Reed, was equally interested. In the Senate, the bill received the most careful consideration by a subcommittee of the Committee on the Judiciary, of which sub-committee Senator Forrest C. Donnell was chairman.

The persons responsible for the work of revision were the staff employed by the West Publishing Company and the Edward Thompson Company, which companies had collaborated in the preparation of the United States Code in 1926 and which the Committee on Revision of the Laws engaged to provide the technical staff for this work. William W. Barron, the Reviser whom they appointed, brought to his task a wealth of experience gained both in government service and private practice.

Representative Members of Our Association Named To Advise

To advise with him and his associates as to the problems arising in the course of the revision, the Committee chose a distinguished group consisting of former Chief Justice Floyd E. Thompson of Illinois, former Justice Justin Miller of the Court of Appeals for the District of Columbia, Circuit Judge John B. Sanborn of the Eighth Circuit, Walter P. Armstrong of Memphis, and John Dickinson of Philadelphia. Circuit Judge John J. Parker of the Fourth Circuit, Professor James W. Moore of Yale University Law School, and Justice Alexander Holtzoff of the District Court for the District of Columbia acted as special consultants.

In addition the Judicial Conference authorized a judicial committee, to which Chief Justice Stone appointed District Judges Clarence G. Galston of the Eastern District of New York, William F. Smith of the District of New Jersey, and the writer, to collaborate in the work.

Many Meritorious Proposals Necessarily Omitted from Bill

This entire group of advisers, including the editors-in-chief of the two publishing companies, met with the reviser for three-day conferences on four different occasions during the two years of the work. At these conferences the successive drafts prepared by the reviser and his staff were considered in detail section by section, and the problems which they presented were fully discussed and decisions reached for the guidance of the revision staff. Drafts of the revision were also widely circulated and many helpful suggestions were received from members of the bench and Bar and incorporated in the final draft.

Needless to say, many other meritorious suggestions, some of them approved by the Judicial Conference, were received which could not be included because the Congressional committees in charge of the revision bill believed that they might give rise to such controversy as would imperil the passage of the bill itself. Doubtless many of these proposals will be presented to the next Congress in the form of amendatory bills.

The result of all the labor just described is the revision which on September 1 became Title 28 of the United States Code. It is the hope of those who assisted in its preparation that the profession will find it good and that its passage will hasten the revision and enactment into positive law of the remaining titles of the United States Code.

4 United Nations

(Continued from page 869)

agreed to at Yalta was rejected by Secretary of State Stettinius. Moreover, the American delegation inserted into a joint interpretative statement, issued by the Big Five on June 8, 1945, a sentence to the effect that they were not expected to "use their veto power willfully to obstruct the operation of the Council".

It must be admitted that the British, French, and American representatives felt that, since the great powers were to bear the major responsibility for giving effect to any Security Council decision, more especially one involving military operation, they should be afforded the protection of the veto. However, the American conception of the veto was that it would be used only for major purposes and in extreme emergencies. It was the hope of the American delegation that the interpretative statement accepted by Russia, along with the other great powers, would lessen

the likelihood of the veto being used to obtain tactical advantages or to block ordinary decisions concurred in by a majority of the Council. That hope was a vain one. The veto has not been restricted to that interpretation. In the three years of the Security Council's existence, Russia has resorted to the veto twenty-six times. In addition, the veto has been used once by Russia and France together, and once by France alone. As a result, effective action by the Security Council in matters of grave importance has been obstructed.

Steps for Partial Solutions of Abuses of the Veto Power

A partial solution of the veto problem may result from work of the Interim Committee or the "Little Assembly" which was set up by the General Assembly in the fall of 1947. That Committee considered ninety-eight possible types of decisions which the Security Council can make. The Charter provides that decisions on procedural matters shall be made by an affirmative vote of seven members. The Committee concluded that the following thirty-six categories should be regarded as procedural:

(a) The nine categories which appear in the Charter under the heading "Procedure";

(b) Decisions which concern the relationship between the Security Council and other organs of the United Nations, embracing 13 categories;

(c) Decisions which relate to the internal functioning of the Security Council and the conduct of its business, embracing six categories;

(d) Decisions which bear a close analogy to decisions under (a), (b), (c);

(e) Decisions which are instrumental in arriving at or in following up procedural decisions, embracing six categories.

In addition, without deciding that decisions belonging to the following group are actually procedural, the Committee recommended that nineteen categories of decisions should be taken by a procedural vote of the Security Council in order to improve the functioning of that body and permit it, promptly and effectively, to fulfill its responsibilities under the Charter:

(a) Recommendations on the admission to membership in the United Nations;

(b) Decisions whether a matter is or is not procedural (double veto);

(c) Decision whether a permanent member of the Security Council is "a party to a dispute" and should abstain from voting;

(d) Decision whether a question is a "situation" or a "dispute";

(e) All decisions with respect to the pacific settlement of disputes under Chapter VI of the Charter.

What will result from the report of the Interim Committee cannot be definitely forecast. It is of transcendent importance that some way be found to curb the use of the veto. On procedural matters, on the admission of new states, and as to peaceful measures for the settlement of disputes and the prevention of aggression or threats of aggression, there should be no right of veto.

UN Must Be Made Strong and Effective with American Help

We can no longer countenance the blighting effect of the unbridled use of the veto on the growth and development of the United Nations. It must be made a strong and workable peace organization.

Some will, no doubt, assert that what I suggest involves some surrender of national sovereignty. It will result in restrictions on unbridled international freedom; but it will constitute the exercise, not the surrender, of national sovereignty.

We have seen twice in the last thirty years that it is impossible for America to remain aloof or avoid being brought into these recurring world conflicts. It is an act of sovereignty, not a surrender thereof, to engage in war. It is an act of sovereignty, not a surrender thereof, to enter into an international arrangement to provide a substitute of peaceful processes for war, to create a world order based on law and justice as a substitute for world anarchy. It is a question of how we shall exercise, not a surrender of, our sovereignty if we face the facts and view the alternatives objectively.

Liberty is not the exercise of unbridled will. It implies the existence of an organized society maintaining public order without which liberty would be lost in the exercise of unrestrained abuses. To agree to adhere to the principles of right and justice among nations, maintained through an international association maintaining international order, is not a surrender of our national freedom. It is a substitution of ordered liberty among nations for international anarchy. Of course, we cannot be required to use armed force without our consent and we are protected by the requirements of our constitutional processes.

Our Country's Course in this Critical Period

We should faithfully live up to our obligations under the Charter. We should see to it that our public acts, whether carried out through the United Nations or otherwise, are consistent with its Charter. We should make it abundantly clear that aggression against either the territorial integrity or political independence of any nation will be resisted by every force available to the United Nations. We should lead the way in insisting that the United Nations be made an effective and workable peace organization, and that the nations of the world submit to a rule of law based on morals, reason, and justice. We should exercise patience, but firmness. We should insist that the weak shall be free to choose their own way of life and their own political system. We should not seek to impose our economic or political system on any people, except as the manifestation of the merits of those systems in America may impel their adoption. We should extend aid upon wise, reasonable, and proper conditions in the rehabilitation of western Europe, but not to the extent that will impoverish us or endanger our domestic economy. We must make our own economic and political systems work efficiently and competently.

An America kept strong and virile, seeking neither political nor economic advantage and unselfishly leading the way in bringing to bear the force of the moral judgment of the law-abiding nations of the world, the

4 Accomplishments of United Nations

force of a world conscience, that aggression against territorial or political integrity of any nation shall not be tolerated, that international controversies must be settled by peaceful processes in accordance with law, justice, and right, and that the United Nations must be made a strong, effective, and workable peace organization, is the world's best hope of peace. It is all we have. We dare not let it fail.

5 Team-Work in Tax Practice

(Continued from page 873)

whether it be one pertaining to a reorganization, estate, trust, partnership, to a failure to distribute surplus, or whatever it may be—will involve some application and variation of this point. If, therefore, in setting up and planning a tax transaction, thorough consideration is not given to anticipating the procedural requirements, in the event of dispute and litigation, as well as to the requirements of the substantive law, the work has not been properly done and the desired result of minimizing tax liability cannot be accomplished.

Cooperation After Consummation of the Transaction and Before Litigation

Suppose now that a taxable transaction has been consummated and, either because of incompetent advice or no advice at all prior thereto, the tax liability on the transaction is disputed by the revenue agent. It is at this point, even prior to the preparation of his report, that the joint efforts of the accountant and tax attorney in developing the pertinent and relevant facts and law should prove most effective.

In the first place, it is at this point that the taxpayer begins, in his statements and documents submitted to the revenue agent, officially to make the permanent record in his case. These statements and documents will, for all practical purposes, serve as the record on the trial of the case. It is at this point, therefore, that the trial of the case may be won or lost, and it is essential that the case be considered with this in mind at the time.

Secondly, before the revenue agent has officially committed himself to his written report in the 30-day letter, careful and thorough preparation of the case for the taxpayer at this stage by an accountant, thoroughly familiar with the facts and with the applicable principles of accounting, and by a tax attorney, thoroughly familiar with the applicable substantive and procedural law, will accomplish the most favorable settlement possible in the case at that time, with resulting savings in fees, interest and time of all concerned.

Thirdly, a case carefully prepared at this point, with a full knowledge of the procedural and substantive requirements of the law in the event of trial of the case, will permit an accurate basis on which to determine the amount at which to settle the case. Without the benefit of such an evaluation, based on an accurate knowledge of the probability of winning the case on trial, any settlement figure is no better than a guess; the taxpayer is at the mercy of the revenue agent, who has competent government counsel fully capable of advising him of precisely the most favorable basis on which to settle, in the light of the chances of success if the case is tried.

Let us consider now that the taxpayer has "shot both barrels" in attempting to effect an administrative settlement of the case and has, on the basis of an informed evaluation of his chances of winning the case on trial, concluded, as is sometimes the case, that he can get more by trying the case than by settlement and therefore has decided to proceed with the litigation of the case.

At this point, and again, long before the actual litigation, the taxpayer must make certain decisions which may well win or lose the case on trial. First, he must decide whether to pay the tax and file a claim for refund, in which event he will have irretrievably committed himself to the jurisdiction of the United States District Court or the Court of Claims; or he may decide to continue protesting his liability to pay the tax, in which event he will be irrevocably committed to the jurisdiction of the Tax Court.[10]

There are certain vital procedural and other factors connected with the later trial of the case to be considered in making this decision, and as we shall see, a correct evaluation of these factors is required at this time in order to insure success on the later litigation of the case. Let us then examine some of these factors which are to be weighed in making a decision whether to pay the tax and file a claim for refund or to protest the payment of the tax.

Scope of Appellate Review and Precedents

In the famous *Dobson* case[11], the Supreme Court delimited the power of a Circuit Court of Appeals to review a decision of the Tax Court by holding that the determination of the Tax Court is final on all issues except those which are clear-cut questions of law. As a result of this de-

10. At this point, the fundamental difference between the jurisdiction of the Tax Court and the federal Courts in tax litigation should be noted. In brief, the Tax Court has exclusive jurisdiction to redetermine a tax deficiency; the federal District Courts and the Court of Claims, with but few exceptions, have exclusive jurisdiction over refund litigation. In deficiency litigation, over which the Tax Court has exclusive jurisdiction, the Commissioner is seeking to collect a larger tax payment from the taxpayer; in refund litigation in the federal Courts, the taxpayer is seeking to recover an overpayment of taxes which he claims he has erroneously paid or the Commissioner has erroneously collected. It should also be noted that the Tax Court's jurisdiction in tax matters is further limited to a consideration of income, excess profits, estate and gift tax deficiencies; it has no power to hear controversies involving the various miscellaneous taxes, such as the stamp tax, the admission tax, and the different manufacturers' excise taxes. Overpayment of these taxes can be recovered only by the refund route in the federal Courts. Since the Tax Court's jurisdiction arises only when the Commissioner has issued a notice of deficiency in the form of the familiar 90-day letter, and the taxpayer has filed a petition with the Court to redetermine the deficiency, it follows that if no deficiency notice has been issued, claimed overpayment may be recovered only by a refund suit in the federal Courts. But in the event the Commissioner asserts that additional taxes are due, the taxpayer has an important decision to make—he has the option of paying the tax demanded, filing a claim for refund, and suing in the federal Courts, or, after receiving the deficiency notice, filing a petition with the Tax Court.

11. 320 U. S. 489, 64 S. Ct. 239 (1943).

cision, many appeals from the Tax Court have been affirmed solely on the basis of the *Dobson* rule and without any consideration of the merits of the controversy.[12]

In view of this decision, it appeared that the Tax Court's decision must be accepted as final in substantially all tax cases. If the issue involved in the *Kelley* and *Talbot Mills* cases[13]—the interpretation of the legal nature of certain documents—is not a question of law reviewable by the Circuit Court of Appeals, then the reviewable issues must be very few indeed.

The *Dobson* rule, however, was not applicable to appeals from the federal District Court. The decisions of the District Court are not vested with such immunity or finality, and the power of the Circuit Court of Appeals to reverse was not impaired. As a result of the difference between the power of the Circuit Court with respect to appeals from the Tax Court, as compared with appeals from the District Court, the forum of litigation could well have been the deciding factor in the case. Before the taxpayer could properly elect the Court in which to litigate his case, it was essential that a search and analysis be made of the decisions of the Tax Court and the local Circuit Court. If the Tax Court had decided similar issues in the taxpayer's favor, the case should have been litigated in the Tax Court; if the Tax Court had decided similar issues against the taxpayer, suit should have been brought in the District Court. If the Tax Court had not previously passed on the issue but the Circuit Court had decided it favorably, suit should have been brought in the District Court. If the case was litigated in the Tax Court and that Court held against the taxpayer, the Circuit Court may have felt bound to affirm the Tax Court even if the Tax Court's decision was contrary to a prior decision of the Circuit Court.[14]

One more thing: Suppose that upon analysis of the decided cases it is concluded that the taxpayer's chances are weak, both in the Tax Court and in the Circuit Court. Then it may be desirable to institute suit in the Court of Claims. This Court is quite independent, and is likely to make its own conclusions and decisions without paying too much attention to the decisions of the other Courts.

Decision Whether To Seek a Jury Trial May Be Important

Another factor which may vitally affect the outcome of the taxpayer's case on trial, and which must be considered in making the decision as to whether to pay the tax and file a claim for refund or protest the tax on through the Tax Court, is the determination as to whether the case can be best handled with or without the benefit of a jury. If it is considered that the taxpayer will get a more sympathetic consideration from a jury than from a judge, or if, on the other hand, it is considered desirable to preclude a sympathetic hearing on the government's case by a jury, then the taxpayer can at this point determine at his own election whether a jury trial will or will not be availed of at the trial of the case. This follows from the fact that suits tried before the Tax Court and the Court of Claims are tried without jury, whereas suits tried before the federal District Courts may or may not be tried before a jury, depending upon whether the Collector is named as a party defendant, rather than the United States.[15]

Hence, if a taxpayer considers it desirable to preclude the possibility of the government's calling a jury for the trial of its case, he will elect to take the case before either the Tax Court, the Court of Claims, or, under proper circumstances, before the District Court, naming the United States, rather than the Collector, as defendant. If, on the other hand, he wishes to insure his right to have a jury trial, he will then have to bring the case in the District Court, naming the Collector of Internal Revenue as defendant.

The importance of making this decision with respect to a jury and the vital part that it can play in winning or losing a case at the later trial thereof, is best illustrated in the proceedings in *Farmers Loan & Trust Company* v. *Bowers,* popularly known as the *Astor* case.[16] In that case, the taxpayer brought two suits against the Collector of Internal Revenue for recovery of more than $10,000,000 in estate taxes. The issue was whether two trusts created by William Waldorf Astor for the benefit of his two sons were gifts made in contemplation of death and, therefore, includable in his gross estate. In the original trial before the District Court without a jury, the plaintiff obtained judgment.[17] On appeal, the Circuit Court of Appeals reversed the case, on the ground that the trial Court erred in not applying the proper rule of evidence and the case was remanded to the District Court for a new trial.[18] At the second trial, the government asked for a jury, as it was permitted to do as a matter of right with the Collector named as defendant, obtained a verdict, and sustained it upon appeal.[19]

Counterclaim by Government Is a Consideration

Another factor which may prove of great importance to the taxpayer in

12. The application of the *Dobson* rule is well illustrated by the decision of the Supreme Court in *John Kelly Company* v. *Commissioner,* and *Talbot Mills* v. *Commissioner,* 326 U. S. 521; 66 S. Ct. 299 (1946). Effective September 1, 1948, the *Dobson* rule has been repudiated by legislative action in the Judiciary Act, H. R. 3214, P. L. 773, signed by the President on June 25, 1948.

13. *Idem.*

14. As an illustration of this last point, consider the decision of the Second Circuit in *Kirschenbaum* v. *Commissioner,* 155 F. (2d) 23 (1946), cert. denied 329 U. S. 726, 67 S. Ct. 75 (1946).

15. Suit may be brought against the United States for an amount in excess of $10,000 if the Collector of Internal Revenue to whom the tax is paid is dead or no longer in office at the time the proceeding is commenced, Sec. 24(20) Judicial Code. If the Collector is alive, he may be sued personally for recovery in any amount, whether still in office or not and, if still in office, he is the only proper defendant in suits in excess of $10,000, *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1 (1921). If he is dead, the suit in any amount may be brought against his personal representative but never against a predecessor or successor in office. In other words, if a Collector is named a defendant, he must be the Collector (or, if dead, his personal representative) who received payment of the tax, even though he no longer is in office; no other Collector is a proper defendant.

16. 98 F. (2d) 794 (CCA 2d, 1938).

17. 15 AFTR 738 (D. Ct. S. D. N. Y., 1931).

18. *Bowers* v. *Farmers Loan & Trust Company,* 78 F. (2d) 916 (CCA 2d, 1934).

19. *Farmers Loan & Trust Company* v. *Bowers,* 98 F. (2d) 794 (CCA 2d, 1938).

electing whether to protest the case to the Tax Court or pay the tax and sue for refund in the District Court is the possibility that there may be lurking in the record a larger potential deficiency than that theretofore asserted by the Commissioner in his deficiency notice. If so, and the case is tried before the Tax Court, the Commissioner can for the first time in his pleadings at the trial of the case, assert a larger deficiency. In a suit for refund of the original deficiency in the District Court, on the other hand, the Commissioner would be confined to a determination of whether or not the amount or refund claimed by the taxpayer was or was not due.

The importance of thoroughly considering the case from this viewpoint at the time of making the decision as to whether to pay the tax and sue for refund in the District Court or to protest the payment of the tax in the Tax Court is strikingly illustrated in the case of *John J. Raskob*.[20] In this case, the Commissioner asserted in an original deficiency of federal income tax for the year 1929 in the sum of $15,977.61. The taxpayer elected to protest his liability for the payment of this sum before the then Board of Tax Appeals, and his original petition and the Commissioner's original answer put in issue only the questions involved in the original deficiency in the amount indicated. Thereafter the Commissioner filed an amended answer, claiming an increased deficiency of $1,026,340.40 The increased amount of the deficiency was approved by the Board of Tax Appeals, and affirmed on appeal. Had the case been tried in the District Court, the taxpayer would, at most, have been subjected to a final deficiency of $15,977.61!

Recoupment Is Available Only in District Court

As illustrated in the Supreme Court's holding in the case of *Commissioner of Internal Revenue* v. *Gooch M. & E. Company*,[21] the taxpayer is sometimes presented with a somewhat converse situation to that which he was confronted with in the *Raskob* case, and may find it necessary to put himself in a position where he can avail himself of an overpayment for a preceding year against a deficiency asserted for a later year. If he takes his case to the Tax Court, he will be precluded from doing so under the Supreme Court holding in the *Gooch* case, *supra,* whereas if he takes his case to the District Court, he may avail himself of the overpayment for the preceding year by way of offset and recoupment.

In the *Gooch* case, *supra,* the taxpayer protested to the Tax Court a deficiency in income and excess profit taxes imposed by the Commissioner for the year 1936 on the basis of an inventory adjustment made in 1938. It developed at the trial of the case before the Board of Tax Appeals, that while the Commissioner's deficiency for 1936 was correct, the inventory adjustments resulting therein had also produced an overpayment of taxes by the taxpayer for the year 1935 which exceeded the amount of the deficiency asserted for the year 1936. Before the Board of Tax Appeals, the taxpayer sought in its amended petition to have its 1935 overpayment applied as an offset or recoupment against its 1936 deficiency. The Board refused to grant this relief on the ground that it did not have equitable jurisdiction to do so, and was sustained by the Supreme Court. Had the case been heard before a District Court, that Court, possessing general equity jurisdiction, would have had the power to grant the recoupment relief claimed by the taxpayer.[22]

The Claim for Refund Is a Part of Pleadings

Assume now that on the basis of due consideration of all the factors discussed above, it is decided by the taxpayer that he should file a claim for refund and sue for recovery of the tax paid in one of the federal Courts. He then must prepare and file a proper claim for refund, or incur the risk of dismissal of his suit. In effect, because of the fact that the filing of a proper claim for refund is a condition precedent to suit, it is a part of the pleadings. It must be carefully considered from that viewpoint at this stage of the proceedings in order to insure the right to litigate the case in Court.

A proper claim for refund, sufficient to form the basis for a suit, must, among other things, completely set forth: (a) The grounds on which the claim is based; and (b) the facts on which the claim is based. The Supreme Court has held that where a claim for refund is grounded on a loss claimed under one section of the revenue acts, the subsequent suit for refund cannot be maintained on the theory that the taxpayer sustained a loss under a different section of the revenue act.[23] In addition to the requirement that the grounds be properly included in a claim for refund, it has been held that in a tax refund suit the taxpayer may be confined to the facts and evidence embodied in his claim for refund at the later trial.[24] The government has attempted to extend this doctrine to suits for refund of taxes other than floor stocks taxes which were involved in the *Samara* case.[25]

Accordingly, it is a serious mistake to regard the claim for refund and suit for refund as separate, unrelated steps. Not only is the claim a necessary prelude to the suit, but it is the very foundation upon which the successful prosecution of the suit depends. The preparation of a tax refund suit should properly begin with the filing of a valid, sufficient and timely claim for refund. The collaboration of the tax attorney and accountant is the most effective way of insuring that the factual and legal

20. 37 B.T.A. 1283, affirmed 118 F. (2d) 544 (CCA 3rd, 1941).

21. 320 U. S. 418, 64 S. Ct. 184 (1943).

22. *Cf. Bull* v. *U. S.*, 295 U. S. 247, 55 S. Ct. 695 (1935); *Stone* v. *White*, 301 U. S. 532, 57 S. Ct. 851 (1937); *Robert A. Elbert et ux* v. *Johnson*, 69 F. Supp. 59 (D. Ct. N. Y., 1946). See also McConnell: "The Doctrine of Recoupment in Federal Taxation", 28 *Va. L. Rev.* 577 (1942).

23. *Real Estate-Land Title and Trust Co.* v. *U. S.*, 309 U. S. 13, 60 S. Ct. 371 (1940).

24. *Samara* v. *Commissioner*, 129 F. (2d) 594 (CCA 2d, 1942).

25. For a general discussion of the *Samara* case and the problems presented thereby, see Sherman: "The Grounds, Facts and Evidence in Tax Refund Claims", November, 1947, issue of *Taxes*, 985.

requirements for a proper claim have been met.

It is believed that the above discussion of certain of the procedural and substantive problems involved in the proper handling of a tax problem has established that cooperation and teamwork between the accountant and the tax attorney are needed, not only in the trial of the case, but from the inception of the taxable transaction, if the interests of the client and, therefore, of both professions, are to be best served. In the long run, such full cooperation will most definitely evidence the best results and the attainment of those results will compel all who wish to survive to fall in line.

6 The Annual Address

(Continued from page 876)

their example. If *this* be treason, make the most of it". Another young lawyer destined to greatness listened attentively to these debates, standing in the entrance to the chamber. He was Thomas Jefferson, aged twenty-two, still in law school.

With the currency of the Virginia Resolutions there came into circulation from Massachusetts a suggestion for a Congress of Delegates to meet in October in New York to consider representations to the King. This was known as the Stamp Act Congress. Twenty-seven delegates were present, though a number of the Colonies were unwilling to commit themselves to the extent of sending representatives. Many days of debate were required before there could be agreement upon a rather innocuous declaration. Feeling ran high. There was rioting in Boston and everywhere all stamps that could be found were destroyed. Numerous importers in comfortable circumstances, unwilling to demean themselves by taking part in these activities, were ready to agree not to deal in those commodities requiring stamps, even at the expense of some diminution of their profits.

Young lawyers led the movement to organize, under the name "Sons of Liberty", with the objective of encouraging the revival of business of all sorts, but without the stamps required by law. And in a resolution adopted by them, there is a reference to their willingness to venture their lives and fortunes to prevent the Stamp Act from becoming effective.

The organized resistance offered by the colonists finally made itself felt in England, and the obnoxious law was repealed in the spring of 1766. By this time Grenville was in the opposition. Pitt, soon to become Prime Minister as the Earl of Chatham, was loud in his praise of the spirit of America.

The British Impose Obnoxious Taxes on Tea

Early in 1767, Townshend in Parliament proposed an Act for duties upon various commodities, including tea. These duties were not vulnerable to the argument that the Parliament had no right to levy an internal tax upon the Colonies. They were to be collected upon imports from England; and for the purpose of collection, provision was made for a Board of Customs Commissioners to function in Massachusetts Bay. The Act was passed without difficulty, and the Commissioners reached Boston late in the fall of that year.

They found the going rather rough, and a year later two regiments were installed in Boston to help hold up their hands; but continual small incidents and minor happenings created ever recurring friction between the townspeople and the troops, resulting at length in the so-called Boston Massacre in 1770, in which four citizens were killed.

The great basic issue was the independence of Colonial legislatures and their right to function without interference from the crown. John Dickinson of Pennsylvania, a very successful lawyer of large means, who had studied at the Middle Temple, a mature veteran of thirty-eight years, and John Adams, availed themselves of the medium of letters, published and circulated extensively, to advance their arguments against the right of taxation of the Colonies by any authority other than the colonial legislators themselves. Dickinson's arguments were highly technical, founded on the difference between laws for regulation and those for raising revenue. Adams, admitting subordination of the Colonies to the authority of the Parliament, insisted nevertheless that all were subject to the British Constitution, and reasoned from this that the colonists as well as Englishmen came under the protecting influence of its provisions.

Dr. Franklin, practical soul that he was, recognized the real difficulty; but he was inclined to believe that the argument against the power of Parliament to make any laws for the Colonies was stronger than the argument on the other side of the main issue to the effect that Parliament had the exclusive power to legislate for America.

Boycott Hurts British Trade, but Tax is Retained

The boycott on imports from England was a severe blow to British trade, and finally impelled Lord North, in response to petition of those affected, to agree to the repeal of all the duties except the duty on tea, which he said must be retained in earnest of the right of Parliament to levy duties on goods imported by the Colonies. The response by America to this action was to continue the application of the non-importation agreement as to tea.

At Faneuil Hall, Samuel Adams moved for the appointment of a Committee to report on the rights of the Colonies and the manner in which they had been violated, and on November 20 in 1772, the Committee listed the right to life, liberty and property among those rights—foreshadowing the preparation of the great Declaration itself.

And then, on December 16, 1773, occurred the Boston Tea Party, when a cargo belonging to the East India Company was consigned to the bottom of Boston Harbor. The company had been granted leave several months previously to export to America without payment of

English duties. This was tantamount to authority in the East India Company to monopolize the trade and fix prices as they would. Again Dickinson came forward and vividly threw into sharp relief the vices of this concession. This is what he said:

> The conduct of the East India Company in Asia, has given ample proof how little they regard the laws of nations, the rights, liberties, or lives of men. They have levied war, excited rebellions, dethroned princes, and sacrificed millions for the sake of gain. The revenues of mighty kingdoms have centered in their coffers. And these not being sufficient to glut their avarice, they have, by the most unparalleled barbarities, extortions, and monopolies, stripped the miserable inhabitants of their property and reduced whole provinces to indigence and ruin. . . Thus having drained the sources of that immense wealth . . . they now, it seems, cast their eyes on America, a new theater, whereon to exercise their talents of rapine, oppression, and cruelty. The monopoly of tea, is, I dare say, but a small part of the plan they have formed to strip us of our property. But thank God we are not Sea Poys, nor Marattas, but British subjects, who are born to liberty, who know its worth, and who prize it high[6].

Acts of Parliament Invaded Prerogatives of the Massachusetts Legislature

Although there were some in England who felt that the Colonies might as well be given up, this was not the general view, and most people looked with approval upon the harsh action of Parliament in passing the Port Bill, revising the Massachusetts Charter, granting additional powers to the Governor, closing the port, and placing General Gage in a position of authority as Governor as well as commandant of the armed forces. Other Acts prohibited town meetings and provided that Colonists charged with crime should be sent to England or to other colonies for trial. The King is quoted as having concluded in a communication to Lord North: "The die is now cast, the colonies must either submit or triumph".

It soon became apparent to the colonists that there must be unity of action and in the fall of 1774 the first Continental Congress convened in Philadelphia. Of its personnel Chatham said:

> . . . that for solidity of reasoning, force of sagacity, and wisdom of conclusion under such a complication of difficult circumstances no nation, or body of men, can stand in preference to the general Congress at Philadelphia . . . all attempts to impose servitude upon such men, to establish despotism over such a mighty continental nation, must be vain, must be fatal[7].

The Colonial Congress Could Not Compel Conformance by Colonies

There was not much dissent from the proposition that the Congress was possessed of no legal authority to compel agreement with its conclusions by the constituent Colonies. Sentiment still existed in favor of a moderate presentation of grievances to the King.

Then the Suffolk Resolves, drafted by 33-year-old Dr. Joseph Warren, who lost his life at Bunker Hill, were approved in Convention in Suffolk County, Massachusetts. They recommended, in effect, the setting up of a government separate from that of General Gage and admitting no obligations to him. Brought forward for the consideration of the delegates, they were promptly adopted.

There followed, out of deference to those who counselled moderation and as a measure of compromise of opposite views, an agreement for the approval of a plan to memorialize the King in accordance with their views, at the same time adopting additional resolutions referred to as the "Association". These latter contained obligations on the part of the colonial representatives limiting very sharply the commodities which they would permit imported after the first of December, agreeing that these commodities be not consumed after March 1, 1775, and practically excluding all exports to Great Britain and Ireland and the West Indies after September 10 of that year The Association further contained a proposal for the appointment of various committees to mark the reception of these resolutions throughout the Colonies.

Certain conditional concessions to the Colonies were finally adopted by Parliament, but they placed the burden on America of admitting the necessity of contributing to the revenues of the King for various expenses incurred in the operation of the government of the Colonies.

Beginnings of Preparations for Armed Resistance to the King's Forces

The militia was organized for defense under the government of the Suffolk Resolves, and arms and ammunition accumulated. These actions General Gage could not countenance, and in the early morning of April 19, 1775, his troops met the little group of Colonial patriots at Lexington. They were the first to know the meaning of that "shot heard round the world." But they did not encounter the real temper and skill, the resourcefulness and the courage of the American fighting man until they had turned from Concord in their march, to work their way back along the road through Lexington and on to Cambridge.

The Second Continental Congress, convening on May 10, sustained the position of Dickinson, eager for conciliation, anxious that the King be petitioned once more; and at the same time provided a Continental army under the command of George Washington, justifying its decision in memorable words; "Our cause is just. Our Union is perfect. Our internal resources are great." And the deputies told the world of their resolve "to die free men rather than live slaves".

This was something to which both Dickinson and Adams could subscribe. Yet even then it is doubtful that the majority conceived of a permanent separation from Britain, but rather hoped the firmness of their stand would induce conciliation. In this they were doomed to disappointment, for their representatives were refused audience with the

6. Carl Becker, *The Eve of the Revolution (The Chronicles of America)*, Vol. 11, pages 204-205.

7. Adele Cooper Scott, *Patrick Henry, (Great American Lawyers)*, Vol. 1, page 122.

King and by the end of the year the British Government had blockaded all colonial ports and embargoed their trade.

In April, 1776, the Congress gave evidence of its spirit by formal action opening its ports to trade from all parts of the world. And then, on June 7, a resolution was introduced by Richard Henry Lee, on behalf of the Virginia Delegation in these terms:

> Resolved that these United Colonies are, and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connections between them and the state of Great Britain is, and ought to be, totally dissolved.

It was finally approved by the Congress on July 2, after two postponements. Already, on June 11, a committee had been designated to prepare a formal Declaration. It consisted of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert R. Livingston. Of these only Livingston did not sign the Declaration. He was recalled too soon to New York, where he devoted his time with John Jay to framing a Constitution and organizing a government for New York.

That committee placed upon the shoulders of Jefferson the responsibility of drafting that Declaration. He, himself, tells the story in a letter to James Madison on August 30, 1823:[8]

> The committee of five met; no such thing as a sub-committee was proposed, but they unanimously pressed on myself alone to undertake the draught. I consented; I drew it; but before I reported it to the committee, I communicated it *separately* to Dr. Franklin and Mr. Adams, requesting their corrections, because they were the two members of whose judgments and amendments I wished most to have the benefit, before presenting it to the committee. . . Their alterations were two or three only, and merely verbal. I then wrote a fair copy, reported it to the committee, and from them, unaltered, to Congress.

Jefferson's Denial That He Drew on Hackneyed Sources for the Declaration

In answer to the suggestion that what he wrote was largely commonplace and hackneyed and that he had copied from other works, he said that he should not be the judge of that, but he continued:[9]

> I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas altogether, and to offer no sentiment which had ever been expressed before. Had Mr. Adams been so restrained, Congress would have lost the benefit of his bold and impressive advocations of the rights of Revolution. For no man's confident and fervid addresses, more than Mr. Adams', encouraged and supported us through the difficulties surrounding us. . . he supported the Declaration with zeal and ability, fighting fearlessly for every word of it.

The Committee's report was presented on June 28, and ordered to lie

8. *Supra*, note 5, page 461.
9. *Ibid.*, pages 462-463.

on the table. On the following Monday, the first of July, it was referred to the Committee of the Whole and taken up there on the second. The Declaration having been debated on July 2, 3 and 4, was on the evening of Thursday the fourth reported out by the Committee of the Whole, approved by the Congress, and signed by all the Delegates present except John Dickinson. Speaking of Dickinson, Jefferson said: "He was so honest a man, and so able a one that he was greatly indulged even by those who could not feel his scruples".[10]

The Signing and Signers of its Immortal Declaration

The original document was on paper. Later the Declaration was engrossed on parchment and signed again on August 2. The New York Delegation did not sign until July 15. The Pennsylvania Convention, being advised that only a minority of its delegates had signed, named a new delegation on the 20th, and all of its members attached their signatures. In a letter to Samuel Adams Wells, Jefferson closed a discussion of the late signers in these words:[11]

> Why the signature of Thornton of New Hampshire was permitted so late as the 4th of November, I cannot now say; but undoubtedly for some particular reason which we should find to have been good, had it been expressed. These were the only post-signers.

The substance of this letter was based on Jefferson's notes to which he referred in this manner:[12]

> I will give you some extracts from a written document on that subject, for the truth of which I pledge myself to heaven and earth; having, while the question of independence was under consideration before Congress, taken written notes, in my seat, of what was passing, and reduced them to form on the final conclusion.

Of the events of that 4th of July, 1776, Thomas Jefferson is reputed by one of his biographers to have recalled later:[13]

> . . . The debate, he said, seemed as though it might run on interminably, and probably would have done so at a different season of the year, but the weather was oppressively warm, and the room occupied by the deputies was hard by a stable, whence the hungry flies swarmed thick and fierce, alighting on the legs of the Delegates and biting hard through their thin silk stockings. Treason was preferable to discomfort, and the members voted for the Declaration and hastened to the table to sign it and escape from the horse-fly.

Thus it came about that the North and the South joined hands, that Virginia and Massachusetts and all the other Colonies, foregoing selfish objectives, stood shoulder to shoulder when the hour struck.

Personalities and Vocations of Various of the Signers

The notes of Jefferson would seem to deny the validity of the report that John Hancock, the first signer, who wrote his name so that all might read, and who attached his signature as President of the Congress, was the only one to sign on the 4th of July.

Many of the delegates to the Congress who signed the Declaration were men without means. Some of these found ways to secure an education. Others were without formal teaching. Some served as apprentices, as did George Taylor, of Pennsylvania, an emigrant from Ireland, "bound to an iron manufacturer", and George Walton, of Georgia, apprenticed to a carpenter who did not allow him candles by which to read at night and thus necessitated the use of pine knots for light. Thomas Stone, of Maryland, rode ten miles to school every day in pursuit of his classical education and borrowed money to pay for his law course.

One of humble station, a physician from New Hampshire, a man of little education but fine intellectual endowments, was Josiah Bartlett. He occupied a position of great importance in the Congress, for his name was the first when the roll was called and the vote taken on the Declaration and he responded "Aye". More fortunate in his opportunities and equally gifted, Benjamin Rush, that peerless figure in the history of medicine and surgery, acquired a splendid education in Edinburgh, London and Paris, made possible only by the sacrifices of his mother, who sold her small estate and worked, that she might provide the necessary funds. During a yellow fever epidemic in Philadelphia, although himself stricken with the disease, he is reputed to have saved the lives of some 6000 people by his conscientious devotion.

Other delegates were men of means, able to secure the best in education for themselves. When Charles Carroll of Carrollton, who signed with identifying qualifications so that the King might know that he and not his cousin was involved in the separation of the Colonies from Britain, pledged his fortune, he offered for the cause no mere token in dollars and cents, for he was perhaps the wealthiest of all the delegates. For many years he studied abroad. He was the last survivor of the signers of the Declaration and died in his ninety-sixth year.

It is told of Thomas Nelson, Jr., of Virginia, a great patriot, that when his State sought a loan of two million dollars, he used his own personal property to raise most of the money. He was in command of the militia at Yorktown and ordered the artillery to bombard his own house, which was thought to be the headquarters of Cornwallis; and when he died, his few remaining possessions were sold to satisfy his debts.

Many of the Signing Delegates were Later Captured and Made Prisoners

Not a few of the delegates were captured and held prisoner, only to find upon their release that their properties had been largely destroyed. Edward Rutledge was one of those held at St. Augustine for a year before exchange. When Charleston fell, Thomas Heyward, Jr., and Arthur Middleton, also of South Carolina, were taken prisoner and when they were exchanged a year later, their

10. *The Writings of Thomas Jefferson, Autobiography*, Vol. 1, page 16.
11. *Supra*, note 5, page 200.
12. *Ibid.*, pages 195-196.
13. John T. Morse, Jr., *Thomas Jefferson* (American Statesmen Series), pages 38-39.

property losses were found to be severe.

Neither poverty nor bad fortune, nor ill health, could deter these staunch Americans. Even as he sat in the Continental Congress, Thomas Lynch, Jr., suffered from illness and some time later, in an effort to rehabilitate his health, embarked on a sea voyage. The vessel in which he set sail was never seen again.

Benjamin Harrison, of Virginia, enjoyed the distinction of being Chairman of the Committee of the Whole which recommended to the House the adoption of the Lee Resolution and the Declaration of Independence. He was the father of William Henry Harrison, ninth President of the United States.

Characteristic of many other signers was the story of Roger Sherman, of Connecticut. To earn a living and support other members of his family, he worked as a shoemaker and as joint proprietor with his brother of a small store. In his leisure hours he studied without instruction, reading only the books that he could borrow, but he was nevertheless admitted to the Bar and was one of the most profound jurists of his day.

Before the final act, one of the younger men in this extraordinary gathering, James Wilson, member of the Bar from Pennsylvania, born in 1742 near St. Andrews, in Scotland, in a pamphlet entitled "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament", written soon after he turned thirty, planted the seed from which were to grow and flower some of the immortal principles announced in the Declaration of Independence, for in that document he wrote:[14]

> All men are by nature equal and free; no one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it; such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.

These were the men, who, with their patriotic fellows, pledged each to the others, his life, his fortune and his sacred honor. They well knew that life could not be tolerated if men were not free, and even as they signed the historic document, they chaffed each other. Stout men expressed envy of those who were lean and whose life on the gallows might therefore be extended. They knew that the very act of attaching their signature was treasonable, but in the face of that they could jest of the penalty to which they might look forward.

Pledges of Staunch and Patriotic Support Through the Years

Patriotic expressions did not cease with the publication of the flaming message of the Declaration, for like earnest pledges have recurred down through the years. Sam Houston, two days after accepting the position of Commander-in-Chief of the Department of Nacogdoches on October 8, 1835, issued this order:[15]

> . . . The morning of glory is dawning upon us. The work of liberty has begun. Our actions are to become a part of the history of mankind. Patriotic millions will sympathize in our struggles, while nations will admire our achievements. We must be united—subordinate to the laws and authorities which we avow, and freedom will not withhold the seal of her approbation. Rally round the standard of the Constitution, entrench your rights with manly resolution, and defend them with heroic firmness. Let your valor proclaim to the world that liberty is your birthright. We cannot be conquered by all the arts of anarchy and despotism combined. In heaven and in valorous hearts we repose our confidence.
>
> Our only ambition is the attainment of rational Liberty—the freedom of religious opinions and just laws. To acquire these blessings, we solemnly pledge our persons, our property, and our lives. . .

Those words were to resound again in humble form in the oath of the Vigilantes of Montana in 1863:[16]

> We the undersigned uniting ourselves in a party for the Laudible purpose of arresting thieves and murderers and recovering stollen propperty do pledge ourselves upon our sacred honor each to all others and solemnly swear that we will reveal no secrets, violate no laws of right and never desert each other or our standard of justice so help us God . . .

Our Debt to Those Who Fashioned Our Independent Age

The signers of the Declaration fashioned our independence. They spoke for the colonists, small in number, great in spirit. But they spoke in ringing tones and gave to the world a message which none might misunderstand. The hardships and privations suffered by many of them with the devastation of their homes and the loss of their property, to say nothing of the incarceration of themselves or members of their families by the British, make an impressive

14. Margaret Center Klingelsmith, *James Wilson, (Great American Lawyers)*, Vol. 1, page 158.
15. Henry Stuart Foote, *Texas and the Texans*, Vol. II, page 135.
16. Hoffman Birney, *Vigilantes*, page 211.

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chapter in the story of their courage and determination. Loss of fortune frequently carried with it imprisonment for debt under the unenlightened laws then in force in the Colonies.

And when they pledged their lives, their fortunes and their sacred honor, they knew that the odds were long, the risk great, the road that lay ahead uncertain and hard. But they acted with confidence born of their faith in the justice of their cause.

We must balance our duty and our privilege to defend, with all the strength at our command, the republic in which we live and its doctrines under which we have prospered, against the insidious encroachments of dictatorship, whether of the individual or of the proletariat, and the unsound and unreasoning arguments to extend the application of our Bill of Rights beyond all the requirements of justice and fair dealing. Its provisions were never intended to protect those who would prostitute the rights of free speech, free press and free assembly to make them serve as a cloak for organized and malevolent sedition. Nor did the framers of these Amendments ever imagine that they would be distorted in meaning beyond recognition by those who, making common cause, would hide behind them in their insidious efforts to secure for themselves alone ever increasing favor and special consideration at the hands of government without regard for the effect upon our Republic and its people as a whole. It is time to check these efforts to nullify the general application of those cherished rights which we have always supposed were guaranteed by the Constitution to all of us.

So today as we face a troubled future, supported by the power and resources of the strongest nation on earth, and re-dedicate ourselves to the principles for which our forefathers so gallantly struggled, let us do so in all humility in tribute to their great hearts.

12 Administrative Procedure

(Continued from page 898)

speaking of *feasible* uniformity and simplicity. Of course there will be immediate objection on the ground that administrative operations are too diverse, too complex, and too variable for subjection to uniform rules of practice and procedure. I hardly think so. For every type of administrative process, we have many judicial counterparts in one form or another, ranging from corporate reorganizations to the administration of water rights. Furthermore, we now know, as we did not ten years ago, a great deal about how administrative operations fall into a few basic categories. That knowledge has been gained in good part through the studies already mentioned, and through subsequent research and comparison that has been going on along many fronts.[11]

In any event, I do not suggest that some one or more persons devise a theoretical set of rules of practice and procedure from *a priori* conceptions. Study will be necessary, but it will not be too difficult. As I have said, the federal administrative agencies have been revising their rules of practice for two years pursuant to the command of Section 3(a) of the Administrative Procedure Act. Those sets of rules may be laid side by side and compared. We may then supplement, so far as necessary, our present knowledge of the problems of particular agencies or processes. We shall thus be in a position at least comparable to that of the committees who have devised uniform rules for the numerous Courts and almost endless variety of law suits.

Moreover, it is not even necessary that we determine in advance whether there should be uniform rules or merely model rules. While I believe that uniformity will be shown to be feasible and desirable, even if it were not, we may still formulate model rules as suggestions upon which agencies may fashion their actual rules. A desirable degree of uniformity may be achieved thereby through voluntary action, if mandatory uniformity should seem impracticable. But let me say again that I do not believe that uniformity will be shown to be impracticable, or even that the issue will lie between uniform rules and model rules. If formulated and promulgated, uniform rules should probably reserve to individual agencies —just as is now reserved to each federal trial Court—authority to supplement the uniform rules. Thus the system of uniform administrative rules of procedure, as in the case of judicial rules of procedure, may be made to provide the necessary flexibility and individuality. The situation will thus be reduced to a matter of informed judgment on the part of those who frame the uniform rules.

The Differentiation of Several Basic Types of Agency Operations

Investigation of the feasibility of uniform rules of administrative procedure leads immediately to the differentiation of the several basic types of administrative regulatory operations. Both the studies previously mentioned and existing legislation recognize them. There is rule-making and there is adjudication, with licensing as a special kind of the latter. All differ according to whether or not there is a statutory requirement of an administrative hearing upon which official judgment must be based. But surely these differences can, and will, be recognized in any set of uniform rules which may be proposed. I believe, too, that such rules should cover the mechanics of judicial review to the

11. The law reviews appear to have turned from studies of operations as they are to a consideration of abstract problems of administrative justice, particularly in their relation to the terms of the Administrative Procedure Act. Congress and the Hoover Commission, however, are continuing studies of actual operations.

extent that existing Court rules do not adequately deal with the subject.

"But," some critic is bound to say, "What are you going to put into your uniform rules?" There will, of course, be fears in some quarters that administrative independence or freedom of action will be impaired. Certainly independence of judgment should not be disturbed. But freedom to act meaninglessly to the increased diversity, complexity, and the confusion of practice and procedure would and should be curbed.

What Will be Contained in Uniform Rules

Yet it is a fair question to ask what will be contained in these uniform rules of administrative procedure. We can indicate their scope. They would include such matters as service of administrative process, the filing of papers, computation of time, and the form and style of documents. Just as there are rules of pleading for Court cases, there should be something similar for the less formal field of administrative justice. A standardized motion practice is badly needed. For "formal" administrative processes there should be at least the rudiments of pre-trial procedure, perhaps the subject of parties and intervention can be regularized, and certainly deposition procedure can be standardized. Procedure for the submission of evidence in written, rather than oral, form may be fostered.[12] The vexed subject of subpoenas should be reduced to uniformity. Simple directions could be stated respecting the handling of different forms of evidence, offers of proof, and so on. Perhaps the subject of exceptions to examiners' reports may be amplified for the benefit of agencies and private parties alike. Procedures for rehearings, reopenings, and reconsideration of cases surely could be stated more meaningfully than at present. These and others like them indicate what I have in mind.

Who Will Make Uniform Rules and by What Authority?

But it may be asked: "Who will make these uniform rules and by what authority will they be promulgated?" Let me answer these questions in reverse order.

I am not going to asume or to argue that uniform rules could be made binding upon both departmental and independent agencies without a special statutory basis. Perhaps it is true that merely model rules could be studied and published upon the authority of the Chief Executive alone. But since we should seek in my judgment uniform and binding rules if possible, statutory authority should be secured. Such a course will also add greatly to the dignity of the project and its acceptance in and out of government. Of course, investigation might be started in anticipation of legislation as an exploratory move. But ultimately, I think, a simple statute will be necessary, in which care is taken to state the scope of the project and all the other things necessary to make it effective.

Lastly, it remains to be considered who should perform this task and how. Perhaps these are the most difficult questions of all. You will recall that the uniform rules of judical procedure were drawn by committees, subject to the ultimate approval of the Supreme Court. The responsibility of the latter was fitting in those cases because it was *judicial* procedure in the federal Courts that was being reduced to a uniform and simple system. But here we propose to deal with *administrative* procedure.

In another respect, however, we can well borrow from past experience

12. See final report of the Attorney General's Committee, page 69.

12 Administrative Procedure

in judicial rule-making. There committees of practitioners, government representatives, and scholars had the first responsibility. They were aided by information and suggestions from voluntary committees of various professional organizations. The mixed committee idea should be a fair, if not the only, approach here. Perhaps legislative representatives should be added.

A Statutory Commission Aided by Bar Organizations and Government Agencies

A statutory commission of that character, aided by specialized committees representing private organizations and government agencies, may be the simplest answer. As in all such things, the fairness of its composition and ability of its membership will perhaps be more important than operating details. Such a commission may make its final report to the Chief Executive, as head of the administrative branch of the federal government, as well as to the Congress. Both should have a voice in the final acceptance or modification of the proposed uniform rules, thereby further safeguarding both governmental and public interests.

I submit that simplified and uniform rules of administrative procedure (1) will benefit both private interests and government agents and agencies, (2) they should be adopted only to the extent study shows them to be feasible and in any event they should permit individual agencies to supplement them in their details, (3) they must differentiate between different forms of administrative operations and contain only matter relating to procedure and practice rather than substance, and (4) they might be formulated by a statutory commission composed of representatives of both governmental agencies and duly interested private parties. The Bar should welcome it as a means of bringing administrative practice within the reach of the general practitioner. The government should welcome it as a means of fostering necessary good public relations, if nothing more. And the Courts might well welcome anything which generates more light and less heat in the field of administrative law.

13 Communism and Communists

(Continued from page 901)

and that if Communism were given legality he thought it would avail itself of that legality to sabotage the Constitution, laws, traditions, and ideals of Americanism. He then offered a resolution (not in written form) to the effect that the House "go on record as recommending to the Board of Governors that it expel from membership in this Association any member of the Communist Party or any member who may now or hereafter refuse to state to any Court or duly constituted authority or Congressional committee whether or not he is a member of the Communist Party".

Howard L. Barkdull, Chairman of the House of Delegates, ruled that Mr. Baldwin's substitute resolution for the substitute resolution of Mr. Gay was in order, but that so far as the resolution dealt with expulsion of a Communist Party member it was out of order, inasmuch as the House had taken previous action on that point. Floyd E. Thompson, of Illinois, declared that while he agreed that any man who adhered to the principles of the Communist Party ought not to be allowed membership in our Association, he could not support a position that a man who relied upon his constitutional privilege of silence ought to be expelled because of such reliance. He said that the House could not adopt this resolution without logically committing itself to the proposition that any member claiming the privilege of silence in regard to any subject, not merely adherence to Communism, ought to be expelled. He felt that the resolution should be defeated because it opened this "wide door".

The Substitute Resolution Is Then Adopted

William G. McLaren, of Washington, drew applause when he emphatically stated:

> . . . I take this position: That while it may well be within the constitutional rights of a man in a Court proceeding or other legally constituted tribunal, if he is asked whether or not he is or ever has been a burglar, to stand upon his constitutional rights and decline to answer upon the ground that questions relating to his personal connection with the art or science or practice of burglary might incriminate him, my point is, so let it be—you have your constitutional rights but we don't want any of you in the American Bar Association. We don't like you.

A vote was then taken on Mr. Baldwin's substitute resolution and it was defeated, 57 to 54. Mr. Milam, after accepting Mr. Gay's resolution as a substitute for that of his Committee, closed the debate by saying, in part:

> The whole gist of the question is what do we understand by a Communist? . . . I do not understand it to be a subscriber to some general social philosophy. To me, a Communist is one who takes his dictates from a foreign government, who owes his allegiance to an alien power, who is dedicated in time of peace to infiltration into influential bodies so as to cause dislocation in our economy and in time of war to embarrass, disjoint and defeat the war effort. To me, a Communist is one who is a member of an international conspiracy dedicated to the destruction of democratic government here and everywhere . . .

He stated that the Association should be unyielding in its opposition to Communism and "willing at all hazards and all risks to come out and pledge faith and fight it".

The motion to approve the Gay resolution as accepted by the Committee was then carried by a narrow margin on a voice vote. No further division was called for.

16 Judicial Powers

(Continued from page 909)

but it differentiated that power from the judicial power conferred by Article III. It also was confronted with a second difficulty. Article III extends the jurisdiction of the inferior Courts created by Congress to cases in which the United States is a party, and since all cases cognizable in the Court of Claims are cases against the United States, the argument was made that the Court of Claims was a constitutional Court.

This is the interesting way by which that particular argument was rejected: In charting the area of judicial power, Article III extends it to *all* cases in law and equity arising under the Constitution and laws of the United States, to *all* cases of admiralty, *all* cases affecting ambassadors, and so on, but when it arrives at controversies to which the United States shall be a party, to controversies between citizens of different States, and some others, Paragraph 2 drops the word "all." Concluding that every word in the Constitution appears to have been weighed with utmost deliberation, the Court held that the use of the word "all" in some classifications and its omission in others was significant. Since no suit can be brought against the United States except by its consent and subject to its conditions, and such immunity is inherent in the nature of sovereignty, the jurisdiction of the Court of Claims is not defined by the grant of judicial power in respect to suits against the United States. It must therefore be found elsewhere, in some other authority which the Congress may exercise under grant to it of the Constitution. So the Court of Claims is a legislative and not a constitutional Court.

Judicial Powers Committed to Persons Not Judges

This brings us to the concluding observation of the Court in the *Williams* case, which, it seems to me, even though specific and not general in its application, sums up and rationalizes the whole concept by which the exercise of judicial power is committed to those who are not judges in the constitutional sense, who have limited tenure of office and whose compensation remains within Congressional control. I quote:

> Since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted Court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional Courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers.

So it appears that the Congress, under the power to lay and collect taxes, may submit controversies respecting taxes to a special board or Court, upon which the constitutional grant of judicial power does not devolve, and under its power to regulate interstate commerce to refer cases to administrative tribunals, including the Interstate Commerce Commission, the Labor Board, the Federal Trade Commission, and so on. Whether this inconclusive study of the seeming anomaly that appears in the exercise of judicial power affords fruitful material for discussion, I leave to you.

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